91-1341

SUPREME COURT, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

Appendix 1 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARGUED MAY 13, 1991 DECIDED JUNE 11, 1991

NO. 90-7170

THANH VON HOAI, et al.,
APPELLANTS

v.

THANH VAN VO, et al.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(Civil Action No. 89-2397)

Laurence A. Elgin, with whom John D. Hemenway was on the brief, for appellants.

J. Gordon Forester, Jr., with whom Stephen H. Abraham was on the brief, for appellees Sun Refining and Marketing Co., J. Gordon Forester, Jr., Geoffrey Wagner and Joseph P. Zulli.

Brian P. Maschler, of the bar of the Supreme Court of California, pro hac vice, by special leave of the court, with whom Francis X. Markey was on the brief, for appellees Jones, Day, Reavis & Pogue, Millard F. Ottman, Jr., and David C. Roseman.

Robert J. Pleshaw entered an appearance for appellee Thanh Van Vo.

Before EDWARDS, BUCKLEY AND RANDOLPH, Circuit Judges.

Opinion for the Court, filed by Circuit Judge EDWARDS.

EDWARDS, Circuit Judge: This case arises from the claim of the appellants, Thanh Vong Hoai, David Hemenway and John Hemenway, that they were deprived of their civil rights in violation of 42 U.S.C. § 1983 (1988) and 42 U.S.C. § 1985 (1988) during the course of prior litigation involving Mr. Hoai's right to operate a gas station franchise. Named as defendants in the appellants' suit are Thanh Van Vo, competing claimant to the franchise, Sun Refining and Marketing Company ("Sunoco"), owner of the franchise, and attorneys representing them, including the law firm of Jones, Day, Reavis and Pogue ("Jones, Day") (collectively, the "appellees"). the District Court dismissed the appellants' case for failure to state a claim upon which relief can be granted. see Hoai v. Vo, Civ. Action No. 89-2397

(D.D.C. Oct. 2, 1990), reprinted in Joint Appendix ("J.A.") 778.

We agree with the District Court that the appellants' civil rights claim is fatally flawed. Specifically, the appellants' complaint alleges no facts to support a finding that the appellees, all private parties, acted "under color of" law for purposes of section 1983. Nor do the appellants allege the existence of a conspiracy motivated by a class-based, invidiously discriminatory animus, as required by section 1985(3). Accordingly, we affirm the District Court dismissal of the action.

I. BACKGROUND

This cases arises from a long-standing, and thoroughly litigated, dispute between Hoai and Vo over the right to a Sunoco gas station franchise located in Washington, D.C. The merits of that dispute are not now before the court. Rather, the appel-

lants' civil rights claim focuses on the conduct of the appellees during previous litigation involving the franchise. The course of the relevant legal proceedings is therefore charted briefly below.

In August 1986, Vo initiated legal action in connection with the franchise by filing suit against Hoai and Sunoco in the Superior Court of the District of Columbia ("D.C. or "District"). Also named as defendants were John Hemenway, who had been acting as Hoai's attorney, and his son, David Hemenway, who had been acting as Hoai's agent. Vo was represented before the D.C. Superior Court by attorneys from Jones, Day.

In essence, Vo alleged that Hoai first transferred the Sunoco Franchise to him and then, with the aid of the Hemenways, wrongfully evicted him from the gas station. See Amended Verified Complaint, reprinted in J.A. 138. In response, Hoai

claimed that he was the rightful owner of the franchise, and that he had signed his interest over to Vo only under duress, including threats of violence. See Answer, Counter-Claim and Third Party Claims, reprinted in J.A. 164. After holding an evidentiary hearing, the Superior Court granted Vo's motion for a Temporary Restraining Order ("TRO") reinstating Vo in the gas station, removing Hoai from the station, and directing Sunoco to continue supplying the station with gasoline. See Vo v. Hoai, Civ. Action No. 7075-86 (D.C. Sup. Ct. Aug. 29, 1986), reprinted in J.A. 82.

On September 8, 1986, the Superior Court accepted a voluntary consent agreement between Vo and Sunoco, pursuant to which the terms of the TRO as to Vo and Sunoco were extended for up to an additional seven months, or until there was a prior resolution of the dispute between Vo and Hoai.

See Vo. v. Hoai, Civ. Action No. 7075-86 (D.C. Sup. Ct. Sept. 8, 1986) reprinted in J.A. 85. The consent order was negotiated by Vo's attorneys and by attorneys representing Sunoco. Hoai and his counsel were not notified of the consent agreement until after it was accepted by the court.

Hoai appealed the Superior Court's acceptance of the consent agreement; however, while this appeal was still pending, the consent agreement expired on March 31, 1987, and the D.C. Court of Appeals subsequently ruled the appeal moot. The case was then remanded to the Superior Court for a trial on the merits of Vo's claim against Hoai. See Hoai v. Vo, No. 86-1323 (D.C. Mar. 4, 1988), reprinted in J.A. 162. The case before the Superior Court, which was stayed on the motion of Hoai

while he pursued several related suits, is still pending.[1]

In August 1989, Hoai and the Hemenways filed the civil rights action underlying this appeal. At the heart of the appellants' claim are alleged abuses of the D.C. Superior Court process by Vo, Sunoco and their respective attorneys. In essence, the appellants allege that they were deprived of their civil rights in

[1]Among the avenues of litigation pursued by Hoai was a RICO suit filed against Vo and others in the United States District Court for the Eastern District of Virginia. That court dismissed Hoai's action in July 1987. See Hoai v. Vo, Civ. Action No. 87-0294 (E.D. Va. July 2, 1987) reprinted in J.A. 3380. Hoai also sued Sunoco in the United States District Court for the District of Columbia, alleging that the termination of his franchise violated the Federal Petroleum Marketing Practices Act ("PMPA"). After this court reversed a District Court decision to stay the action pending resolution of the Superior Court proceedings, see Hoai v. Sun Refining & Marketing Co., 866 F.2d 1515 (D.C. Cir. 1989), the District Court granted Hoai's motion for summary judgment as to liability. See Hoai v. Sun Refining & Marketing Co., Civ. Action No. 87-2456 (D.D.C. Oct. 1, 1990). The damages portion of the PMPA action is now pending.

violation of sections 1983 and 1985 when the appellees lied to the court in order to obtain the initial TRO and then impermissibly excluded Hoai and his attorney from proceedings resulting in an extension of that TRO. See complaint, reprinted in J.A. 1.

On October 2, 1990, the District Court dismissed the action, holding that the appellants had failed to allege facts sufficient to support either a finding that the appellees acted under color of law for purposes of section 1983, or a finding that they acted with a class-based invidious discriminatory animus as required by section 1984(3). See Hoai, mem. op. at 3-7, reprinted in J.A. 780-84. In response to outstanding motions for sanctions filed by appellants to show cause why sanctions should not be imposed. See id. at 7-8, reprinted in J.A. 784-85.

On November 1, 1990, the appellants filed with the District Court both notice of appeal of the October 2 order and, pursuant to rule 60(b) of the federal rules of civil procedure, a motion for reconsideration and correction of the order. See rule 60(b) motion of plaintiffs, reprinted in J.A. 981. On December 28, 1990, two months after the notice of appeal had been filed, the appellants moved to amend their complaint, in part by adding several new causes of action. See plaintiffs' motion to amend, Hoai, Civ. Action No. 89-2397 (filed Dec. 28, 1990). The District Court heard argument on the appellants' motion, as well as on the question of sanctions, on February 1, 1991. No rulings had issued as of May 13, 1991, the date of oral argument in this appeal.

II. ANALYSIS

A. Appellate review

We begin by addressing the question, raised for the first time at oral argument, whether the rule 60(b) motion for reconsideration pending before the district court bars appellate review of the order dismissing the appellants' action. we find that it does not. It is true that some post-trial motions, including a timely motion to amend or alter a judgment under Rule 59(e),[2] render ineffective any notice of appeal filed before their disposition. See Fed.R. App. P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). A Rule 60(b) motion for relief from judgment is not, however, among the post-trial motions that operate

[2]Fed. R. Civ. P. 59(e).

to preclude appellate review during their pendency. See Fed. R. App. P. 4(a)(4).[3]

Therefore, the pendency of the appellants' rule 60(b) motion in no way affects our jurisdiction over this case. Rather, when both a Rule 60(b) motion and an appeal are pending simultaneously, appellate review may continue uninterrupted. At the same time, the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be

[3]Nor may we bring the appellants' motion within the ambit of Rule 4(a)(4) of the Federal Rules of Appellate Procedure by construing it as one to amend or alter a judgment under Rule 59(e). A post-judgment motion challenging the correctness of a trial court judgment may be treated as a Rule 59(e) motion only when it is filed within the time limits prescribed by Rule 59(e). See Moy v. Howard Univ., 843 F.2d 1504, 1505-06 (D.C. Cir. 1988). Because the Rule 60(b) motion in this case was not filed within 10 days of judgment, we are obliged to treat the motion pursuant to the dictates of Rule 60(b), and Rule 4(a)(4)'s limit on appellate review is inapplicable.

granted. See Reuber v. United States, 750 F.2d 1039, 1051 n.16 (D.C. Cir. 1984) (as amended Jan. 23, 1985); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280 n. 22 (D.C. Cir. 1971) cert. denied., 406 u.s. 950 (1972). Here, the District Court has not indicated any willingness to grant the appellants' motion, and remand is thus unwarranted.

Accordingly, we reach the merits of the case before us. Our review is, of course, limited to the District Court dismissal order of October 2, 1990, the judgment from which appeal was taken on November 1, 1990. See notice of appeal, Hoai, Civ. Action No. 89-297 (filed Nov. 1, 1990). The appellants' motion to amend, filed after issuance of the judgment and notice of appeal, is not before this court.

B. Section 1983

Count I of the appellants' complaint alleges a violation of section 1983, which holds liable

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected [another person] to the deprivation of any rights, privilges, or immunities secured by the Constitution and laws ...

42 U.S.C § 1983. to state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted "under color of" the law of a state, territory or the District of Columbia. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). We agree with the District Court that the second part of this standard is not satisfied by the factual

allegations of the appellants in this case.[4]

The essence of the appellants' complaint is that Vo, Sunoco and their lawyers wrongfully deprived Hoai of his interest in the gas station franchise "under color and authority" of the District of Columbia Superior Court. See complaint at para. 33, reprinted in J.A. 12. The factual picture painted by the complaint is one in which the appellees lied to the court and advanced an "erroneous and illegal theory of law" in order to obtain the original TRO, and then impermissibly extended the TRO by consent agreement without first notifying Hoai and his attorney. See id. at paras. 32-33, 27, reprinted in J.A. 11-12, 9. The complaint asserts that the Superior Court, an "unwitting" party to the

[4]Because we are in agreement with the District Court on this point, we do not reach the appellees' alternative argument that the appellants' complaint inadequately alleges deprivation of a federal right.

actions complained of, failed to exercise any "independent judgment" and thereby granted the TRO and accepted the consent agreement through "ineptitude and error." See id. at paras. 43, 32, reprinted in J.A. 15, 11. In other words, what is alleged is an abuse of the D.C. court system by private litigants and their attorneys. See id. at paras. 27, 45, reprinted in J.A. 9, 17 (alleging violations of local law and rules).

This allegation is insufficient to support a finding of action under color of law for purposes of section 1983. Private parties, like appellees here, may be deemed to have acted under color of law in two circumstances: when they conspire with state officials, and when they willfully engage in joint activity with a state or its agents. See Adickes, 398 U.S. at 152 (quoting United States v. Price, 383 U.S. 787, 794 (1966)); see also

Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 n.21 (1982). No conspiracy with local officials is alleged in this case. Therefore, section 1983 liability turns on whether the appellants' complaint can support a finding of "joint activity" by the appellees and the District of Columbia or its agents.[5] We find that it cannot.

It is well established that mere recourse to state or local court procedures does not by itself constitute "joint activity" with the state sufficient to subject a private party to liability under section 1983. See, e.g., Dennis v. Sparks, 449 U.S. 24, 28 (1980); Crabtree

[5]For purposes of this analysis the attorney appellees stand on the same legal footing as do Vo and Sunoco. An attorney does not act under color of law in her or his capacity as representative of a client in court. See Polk County v. Dodson, 454 U.S. 312, 318 (1981); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). Therefore, the attorneys in this case are properly treated as private parties, and may be held liable under section 1983 only if they have engaged in "joint activity" with the District of Columbia.

v. Muchmore, 904 F.2d 1475, 1476 (10th Cir. 1990); Jones v.Poindexter, 903 F.2d 1006, 1010-11 (4th Cir. 1990); Tunstall v. Office of Judicial Support, 820 F.2d 631,634 (3d Cir. 1987). Lugar v. Edmondson Oil, upon which the appellants place sole reliance, in no way undermines this principle. Lugar does, it is true, hold that private parties may incur section 1983 liability when they use a procedurally defective state process for prejudgment attachment of property, on the theory that they "jointly participate" with the state officials who actually seize the property. See 457 U.S. at 941-42. At the same time, however, Lugar explicitly limits its analysis to "the particular context of prejudgment attachment," and cautions that "we do not hold today that a private party's mere invocation of state legal procedures constitutes joint participation or conspiracy with state officials satis-

fying the section 1983 requirement of action under color of law." see id. at 939 n.21 (internal quotation marks and citations omitted).

Rather, the "joint activity" theory of section 1983 liability continues to require, at a minimum, some overt and significant state participation in the challenged action. See id. at 927; see also Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) cert. denied, 110 S. Ct. 865 (1990) ("joint action ... requires a substantial degree of cooperative action."); Kolinske v. Lubbers, 712 F.2d 471, 479 (D.C. Cir. 1983) (Lugar standard not satisfied absent direct governmental involvement in adoption of or adherence to private agreement). The fatal flaw in the complaint before us today is its failure to allege any such direct or meaningful state participation. Indeed, the action by the state or its agents, characterizing

the D.C. Superior Court judge as an "unwitting" actor who exercises no independent judgment on the part of the District.[6]

Nor does the complaint identify any District rule or custom that might have facilitated the private wrongs alleged. To the contrary, the complaint both implicitly and explicitly alleges that the appel-

[6]The foregoing analysis is unaffected by the Supreme Court's decision in Edmonson v. Leesville Concrete Co., No. 89-7743 (June 3, 1991), rendered after oral argument in this case. Edmonson holds that the use of peremptory challenges by private litigants in civil cases constitutes "state action" subject to constitutional nondiscrimination requirements. At the same time, Edmonson reaffirms the basic principle that private use of state legal procedures does not rise to the level of state action absent "the overt, significant assistance of state officials." See id., slip op. at 7 (citation omitted). Because the peremptory challenge system "simply could not exist" without the direct and indispensable participation of the state and, more particularly, of the judge, the Court found the requisite "significant assistance" in Edmonson. Id. at 7-9. In the instant case, by contrast, such meaningful assistance is never alleged, and Edmonson is therefore inapplicable.

lees abused D.C. court procedures, by "ilegal and unconstitutional use of the color and authority of the [D.C.] laws ...." See Complaint at para. 27, reprinted in J.A. 9. When private parties violate state laws or rules, their actions can in no way be ascribed to the state, and they cannot be deemed to have acted "under color of" law for purposes of section 1983. See Lugar, 457 U.S. at 940.[7]

Conceding that the appellants' section 1983 claim is "unartfully" pleaded and seriously defective, counsel at argument directed our attention to Conley v. Gibson, 355 U.S. 41, 47-48 (1958), which emphasizes the generous "notice pleading"

[7]The appellants attempted to cure this particular deficiency both in their brief and at oral argument, suggesting that the appellees were aided by the operation of a procedurally defective D.C. court rule allowing ex parte consideration of the consent agreement. Because this allegation was not raised in the complaint, however, its introduction at this late date cannot save the appellants' action. We of course express no opinion as to the validity of any District of Columbia rule.

standard of the federal rules of civil procedure. We agree, of course, that "one misstep" by counsel will not always warrant dismissal of a complaint. See id. at 48. But a complete failure to allege facts that would support a finding of action under color of law is not a "misstep" within the meaning of Conley, and it affords valid grounds for dismissal of a section 1983 claim. we therefore affirm the district court judgment dismissing the appellants' claim under section 1983.

C. Section 1985

Count II of the appellants' complaint alleges a violation of section 1985(3) which prohibits conspiracies to interfere with the civil rights of individuals or classes of individuals. See 42 U.S.C. §

1985(3) (1988).[8] The scope of section 1985(3) is limited, however, by the condition that such conspiracies be "motivated by some class-based, invidiously discriminatory animus." See Hobson v. Wilson, 737 F2d. 1, 14 (D.C. Cir. 1984) cert. denied, 470 U.S. 1084 (1985). We agree with the District Court that the appellants' complaint fails to allege any facts tending to show the existence of the requisite class-based, discriminatory motivation.

The only discriminatory animus alleged in the appellants' complaint is targeted at a class of franchise holder; "there is an invidious discrimination against the legitimate holder of a franchise as a rep-

[8]In their complaint, the appellants do not specify the subsection of section 1985 upon which they rely. Like the District Court, however, we find that the complaint is properly construed as resting on section 1985(3), and could not possibly support a claim under either section 1985(1) or (2). See Hoai, mem. op. at 6 n.1, reprinted in J.A. 783.

resentative class ...." See Complaint at para. 49, reprinted in J.A. 20. But it is clear that the kind of class-based animus contemplated by section 1985(3) does not include discrimination against classes defined by economic status or activity. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 838-39 (1983); Hobson, 737 F.2d at 15. Indeed, counsel for the appellants conceded at argument that the appellants' allegations are insufficient to support a finding of conspiracy actionable under section 1985(3). Therefore, we affirm the District Court dismissal of the appellants' section 1985 claim.

D. Leave to Amend.

As noted above, the appellants' motion to amend their complaint, filed with the District Court only after entry of the judgment at issue and after the notice of appeal, is not now before this court. At

oral argument, however, counsel for the appellants suggested for the first time that the appellants are now entitled to amend their complaint to cure the deficiencies discussed herein. We disagree.

It is true that, in certain special circumstances, this court will allow amendment of inadequate complaints. See Martin v. D.C. Metro. Police Dep't, 812, F2d 1425, 1436-38, (D.C. Cir.), reh'g granted & opinion vacated in part, 817 F.2d 144 (D.C. Cir.), reh'g dismissed & opinion reinstated, 824 F.2d 1240 (D.C. Cir. 1987); Hobson, 737 F.2d at 30-31. None of those circumstances is present here. This is not a case in which a complaint's inadequacies are attributable to a new development or change in law, or to the inability of plaintiffs to gather relevant facts before discovery. Cf. id. Rather, the inadequacies we have identified result only from "unartful" drafting, as counsel

conceded, or, at bottom, from a simple absence of facts upon which more "artful" pleading might have been based. Under such circumstances, leave to amend is not warranted.

III. CONCLUSION

For the reasons set forth above, we find that the appellants have failed to allege facts sufficient to state a claim under either section 1983 or 1985(3). Accordingly, we affirm the District Court dismissal of the case.

So ordered.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs,)
v.) C.A. NO. 89-2397
) LFO
THANH VAN VO, et al.,)
Defendants.)

[Stamp:] FILED
Oct 02, 1990
Clerk, U.S. District Court
District of Columbia

ORDER

For the reasons stated in the accompanying memorandum, it is this 1st day of October, 1990, hereby

ORDERED: that defendants' motions to dismiss should be, and hereby are GRANTED; and it is further

ORDERED: that plaintiffs' cause of action is DISMISSED; and it is further

ORDERED: that, on or about October 19, 1990 plaintiffs' attorneys, John D. Hemenway and Laurence A. Elgin, shall show cause, if any there be, why they should not be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

/s/

Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs,)
)
v.)C.A. NO. 89-2397-
)LFO
THANH VAN VO, et al.,)
Defendants.) [stamp]
FILED
OCT 02 1990
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiffs in this action assert that defendants' conduct in connection with a prior litigation deprived plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1983, 1985. For the reasons stated below, an accompanying order will grant defendants' motions to dismiss and dismiss plaintiffs' cause of action.

I.

Plaintiff Thanh Vong Hoai entered into a franchise agreement with defendant Sun Refining and Marketing Company ("Sunoco") in the spring of 1986. See Complaint at

para. 19. After a dispute arose between Hoai and defendant Thanh Van Vo as to the occupancy of the station, Vo initiated a law suit against Hoai in the District of Columbia Superior Court. See id. at paras. 25-27, 32. Vo was represented in the Superior Court action by defendants Millard F. Ottman, Jr., and David C. Roseman, members of defendant law firm Jones, Day, Reavis & Pogue. See id. at para. 14. In addition to Hoai, the other parties named as defendants in the Superior Court suit were: (1) plaintiff John Hemenway, who had been acting as Hoai's attorney; (2) plaintiff David Hemenway; and (3) defendant Sunoco, which was represented by defendants Geoffrey Wagner, Joseph Zulli, and J. Gordon Forrester, Jr. See Id. at pages 9, 16-18, 36; Affidavit of David C. Roseman, Exhibit A.

On August 29, 1986, the Superior Court issued a TRO that required Hoai and the

Hemenways to return possession of the station to Vo. See id. at page 33; Roseman aff., Exhibit A at 2. The TRO also required Sunoco to continue supplying Vo with petroleum products. See Roseman Aff., Exhibit A at 2. On September 8, 1986, the day before the TRO was to expire, Sunoco and Vo entered into a consent agreement by which Sunoco agreed to continue supplying Vo with petroleum products. See Complaint at paras. 38-41; Roseman Aff., Exhibit B at 2. The consent agreement, which specifically excluded other parties from its terms, was signed by a judge of the Superior Court. See Complaint at paras. 40-41; Roseman Aff., Exhibit B at 3.

II.

In this action, plaintiffs claim that, by obtaining the TRO and by entering into and executing the consent agreement, defendants violated plaintiffs' civil

rights under color of local law. See Complaint at paras. 42-46. Plaintiffs also claim that defendants engaged in an invidiously discriminatory conspiracy to violate plaintiffs' civil rights. See id. at pages 47-50. Plaintiffs seek damages of $30,900,000. Plaintiffs' complaint must be dismissed, however, as it fails to allege sufficient facts to support a finding that defendants acted under color of state law or that defendants acted with an invidious class-based animus.

A.

Count I of plaintiffs' complaint alleges a cause of action under 42 U.S.C. § 1983. Section 1983 provides a private right of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, [another person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...

42 U.S.C § 1983. To state a cause of action under § 1983, a plaintiff must make two showings: first, that the defendant deprived the plaintiff of rights secured by the "Constitution and laws" of the United States, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); and second, that the defendant acted "under color of" the law of a state, territory, or the District of Columbia, see id. (citing Monroe v. Pape, 365 U.S. 167, 184 (1961). Plaintiffs' § 1983 claim must fail because the complaint does not allege any facts to support a finding that defendants acted "under color of" the laws of the District of Columbia.

Plaintiffs' complaint seems to suppose that defendants acted under color of District of Columbia law by using the District of Columbia Superior Court to obtain a TRO and to execute a consent agreement. See complaint at paras. 33-34, 42.

Resorting to a state's judicial system, however, neither cloaks private litigants with state authority nor renders their actions "under color of" state law. See Dahl v. Akin, 630 F. 2d 277, 281-82 (5th Cir. 1980), cert denied, 451 U.S. 908 (1981). Similarly, "a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983." Polk County v. Dodson, 454 U.S. 312 (1981) (footnote omitted). Private litigants are not liable under § 1983 unless they use the state's judicial system in such a way that their conduct may fairly be attributable to the state. The Supreme Court has recognized that "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interaction with the community surrounding them." See

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

Plaintiffs may prove that defendants were state actors in one of two ways. First, defendants may be held liable under § 1983 if they conspired with District of Columbia officials to deprive plaintiffs of federal rights. See Adickes, 398 U.S. at at 152. Plaintiffs' complaint, however, explicitly avoids alleging that defendants conspired with local officials. See complaint at para. 41. Second, defendants may be considered state actors if they acted "consciously pursuant to some law that [gave them] aid, comfort, or incentive." Adickes, 398 U.S. at 212 (Brennan, J., concurring); cf. Moose Lodge No 17 v. Irvis, 407 U.S. 163 (1972) (enjoining enforcement of a state rule requiring Moose Lodge to comply with its own bylaws insofar as they contained racially discriminatory provisions). The com-

plaint, however, specifically alleges that, in "holding out" the consent agreement as an extension of the TRO, defendants acted contrary to "the law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Id at para. 43. As this "holding out" was contary to local law, defendants conduct cannot be attributed to any action of the District of Columbia. This rationale was explained by the Supreme Court in Lugar v. Edmondson Oil:

> Count Two alleged that the deprivation of property resulted from respondents' ... "unlawful acts." By unlawful, petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the state. ... that respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or state decision. Count Two, therefore does not state

> a cause of action under § 1983 but challenges only private action.

Lugar, 457 U.S. at 940. Plaintiffs have not attacked the operation of any District of Columbia law or custom; rather, they have attacked defendants' alleged invalid invocation of District of Columbia law. As a result, they have not effectively alleged that defendants acted "under color of" District of Columbia law.

Section 1983 was designed to protect citizens from interference by states with federally protected rights. To that end, the statute reaches conduct by local government officials acting pursuant to their official authority as well as conduct by private persons acting pursuant to state law or custom. The statute does not, however, protect against purely private conduct that is not somehow sanctioned or aided by a state. Accordingly, as plaintiffs' Complaint fails to allege any facts to support a conclusion that defend-

ants acted "under color of" District of Columbia law, an accompanying Order will dismiss plaintiffs' claim under 42 U.S.C. § 1983.

B.

Count II of plaintiffs' Complaint states a cause of action under 42 U.S.C. § 1985 (3).[1] To establish a claim under 1985(3) a plaintiff must allege:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws ... and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States

Hobson v. Wilson, 737 F.2d 1, 14 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see also Martin v. Malhoyt, 830

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[1] The complaint does not specify under which subpart of § 1985 the action arises. The complaint contains no allegations, however, to support a cause of action under either § 1985(1) or § 1985(2).

F.2d 237, 258 (D.C. Cir. 1987). In addition, plaintiff must allege sufficient facts to prove that the conspiracy was "motivated by some class-based, invidiously discriminatory animus." Hobson, 737 F.2d at 14 (citing Griffin v. Breckenridge 403 U.S. 88 (1971)). Plaintiffs' conspiracy claim must fail because the complaint does not contain any facts to support a finding that defendants were motivated by a "class-based, invidiously discriminatory animus." Id.

Plaintiff Hoai is of Vietnamese ethnicity. See complaint at para. 21. The Complaint, however, neither alleges that defendants were motivated by racial or ethnic animus nor alleges any facts to support such a conclusion. The only class-based discrimination alleged in the complaint is premised upon plaintiffs' status as a franchisee. See complaint at para. 48 (defendants' actions "constituted

an invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder ...") id. at para. 49 ("Under the effects of such a conspiracy there is an invidious discrimination against the legitimate holder of a franchise ... "). Courts have recently begun expanding the protection of § 1985 (3) beyond racial and ethnic groups. See, e.g., New York State Now v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989)(women); Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) (political views). The Supreme Court has specifically held, however, that § 1985(3) does not reach "conspiracies motivated by economic or commercial animus." United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 838 (1983). "Rightful franchise holder[s]," therefore, are not a protected class under § 1985(3). Accordingly, as plaintiffs' complaint does not allege any

facts to support a conclusion that defendants acted with "class-based, invidiously discriminatory animus," the accompanying Order will dismiss plaintiffs' claim under 42. U.S.C. § 1985.

III.

Defendants' Sunoco, Forrester, and Vo have moved for Rule 11 sanctions against plaintiffs' attorneys, John D. Hemenway and Laurence A. Elgin. Defendants assert that plaintiffs' complaint is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and that it was filed to harass defendants and to increase the cost of litigation. See Fed. R. Civ. Proc. 11. Plaintiffs' attorneys have not yet responded to defendants' motion for sanctions. Accordingly, the accompanying Order will require plaintiffs' attorneys to show cause, if any there be,

why they should not be subject to Rule 11 sanctions.

Date: October 1, 1990

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 90-7170 SEPTEMBER TERM, 1991
CA 89-02397

Thanh Vong Hoai, et al.,
Appellant

[Stamp] UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED NOV 19 1991
CONSTANCE . DUPRE
CLERK

V.

Thanh Van Vo, et al.,

BEFORE: Edwards, Buckley and Randolph, Circuit Judges

O R D E R

Upon consideration of appellants' Petition for Rehearing, filed July 11, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /S/
Robert A. Bonner
Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 90-7170 SEPTEMBER TERM, 1990
CA 89-2397

[Stamp] UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED AUG 06 1991

CONSTANCE L. DUPRE
CLERK

Thanh Vong Hoai, et al.,

Appellant

v.

Thanh Van Vo, et al.,

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Appellants' Suggestion for Rehearing En Banc has been circulated to the full Court. no member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

per curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /S/

Robert A. Bonner
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., :
Appellants, :
v. : NO. 90-7170
THANH VAN VO, et al., :
Appellees. :

Monday, May 13, 1991
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 12:30 p.m.

BEFORE:
Judges Edwards, Buckley and Randolph

APPEARANCES:

Laurence A. Elgin, Esq., 8929 Sleaford Place, Annandale, Virginia 22003; on behalf of appellants

J. Gordon Forester, Jr., Esq., Greenstein, Delorme & Luchs, P.C., 1620 1 Street, N.W., Suite 900, Washington, D.C. 20036; on behalf of appellees, Sun Refining and Marketing Company

Brian P. Maschler, Esq., Jones, Day, Reavis & Pogue, 1450 G Street, N.W. Washington, D.C. 20005; on behalf of appellees

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on behalf of Appellees,
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P R O C E E D I N G S

THE CLERK: No. 9 -7170, Thanh Vong Hoai, et al., Appellant_ v. Thanh Van Vo, et al. Laurence A. Elgin, Esq., for Appellants; J. Gordon Forester, Jr., Esq., for Appellee, Sun Refining and Marketing Company; Brian P. Maschler, Esq., for Appellees, Jones, Day, Reavis & Pogue, et al.

THE COURT: You may proceed, counsel.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ.
ON BEHALF OF APPELLANTS

Mr. Elgin: Good morning, Your Honor. My name is Laurence Elgin. I am counsel for the appellants, Thanh Vong Hoai and David Hemenway. With me is Mr. John Hemenway, who, being a member of the bar, is representing himself in this proceeding

and acting as my co-counsel, and on his right is Mr. Hoai, my principal client.

I am reserving 5 minutes for rebuttal.

This case grows out of some events which, although not in this case, have been previously before the Court in a related matter. They originally grew out of events that happened in a proceeding by Mr. Vo, the defendant and appellee here, that was filed against Mr. Hoai, my principal client, and the Hemenways and the Sun Oil Company in the Superior Court of the District of Columbia, which in our contention was a violation of the settlement agreement that is on the record in that court, also in the parallel Petroleum Act case.

The events that precipitated the cause of action here arose after there was a TRO hearing in the Superior Court, in which for 10 days a valuable gasoline station franchise that was, by a standard written

franchise agreement, the franchise of Mr. Hoai, the Hemenways being his agents, Mr. Hemenway, Sr., being his attorney, and David Hemenway being an agent who is helping him in the station, were deprived of that station, and they fully expected and were promised a follow-on preliminary injunction hearing, but that did not happen. Instead, the events occurred which gave rise to the present cause of action.

Namely, the defendants here, in our contention, took advantage of Rule 12-I(b)of the Superior Court rules, which is a rule which is not found in the Federal Rules, although Superior Court rules are modeled indeed by statute on the Federal Rules, except as modified, and that rule at that time, it has since been modified, gave incredible latitude to what was called a judge in chambers. He might, in essence, do whatever he thought was appropriate ex parte.

In this case, what happened was the defendants, Vo and his law firm, the Jones, Day firm at that time was his law firm, made an agreement, without any notice to Mr. Hoai, with Sunoco for Sunoco, in essence, to switch sides, and they proceeded to another judge of the Superior Court other than the TRO judge, who had promised the preliminary injunction hearing, and succeeded in having entered in that court a consent order, in which they claimed to extend the TRO, but only as to themselves and not as to Mr. Hoai.

After this was a fait accompli, Mr. Hoai and his counsel were notified. Mr. Hoai appealed that decision, as appears in the record of the related case, and he raised the constitutional question, and so forth, of due process, but the District of Columbia Court of Appeals simply waited until they had judged the matter moot, a period of some 7 months being involved there,

that was the balance on the written franchise agreement.

Also, I would like to mention -- and we have now put this into the record, it is a matter of record in that court -- that we removed that case at that time to this Court, in order to get all of the causes of action in the court below. Judge Sporkin remanded it, on motion of both Sun and Vo, saying that there was not enough of a Federal question.

We then came over here and we filed a Petroleum Act case, which has previously been the subject of an intermediate appeal in this Court, in which the lower court, with the same judge below, was reversed, and in that case we are now back down below.

In the meantime, while cross-motions for summary judgments are pending in the Petroleum Act case, our statute of limitations on civil rights began to run, and

given what had happened in the Superior Court and the express wish of the judges over there not to be involved in any Federal questions, if they could avoid it, we brought our Federal civil rights actions over here. Okay. That is the background.

Getting to our point, our point basically is this, that on the same day that our long-standing -- it had been out for over a year -- motion for summary judgment in the Petroleum Act case was granted and, now that Sun was denied, our civil rights case was dismissed without further ado, and an opinion rendered on that, as well, and this was without any opportunity to amend, and we believe defies the mandate of the Supreme Court in Conley v. Gibson, in that while the complaint, we acknowledge, was inartful, we believe it can be amended to make it an adequate complaint, and we believe we had a right to amend,

under Foreman v. Davis, and that was simply ignored.

Not only that, but there were outstanding at that time two motions we had filed, one particularly directed to the 1983 aspects of our civil rights complaint, and the other addressed to it generally, asking that matters be stayed in the civil rights case until the resolution of the cross-motions for summary judgment in the Petroleum Act case, which we sought to point out inevitably, whatever decision was arrived at there would affect the situation in the related civil rights case.

QUESTION: Counsel, what's reversible error, as far as you're concerned?

MR. ELGIN: Well, the primary reversal error is this: We should have been given a chance to amend and make our case after the decision in the related case.

QUESTION: Is that motion still pending?

MR. ELGIN: Yes, he has never done anything, our stay motions are still sitting there and he has mentioned them in the last oral hearing, but does nothing, so --

QUESTION: Why is it before us ?

MR. ELGIN: I'm sorry ?

QUESTION: Why is that particular matter before us ?

MR. ELGIN: Well, because the dismissal seemed very final to us. Now, he didn't say anything, I admit, about whether it was amendable or not, but we moved to amend and there has been no results.

The other part of that, let me make this very clear, is that with the opinion dismissing our civil rights complaint was an order for us to show cause, particularly myself and Mr. Hemenway, as to why we shouldn't be sanctioned under Rule 11. We felt in the situation that this was simply an attempt to do that which all of the Rule 11 cases say the rule is not for,

that is to chill us. Even though we felt intimidated --

QUESTION: We don't have Rule 11 before us now. Okay ?

MR. ELGIN: I'm sorry ?

QUESTION: Rule 11 is not before us.

MR. ELGIN: There's no decision on the Rule 11, but it is part of the order.

QUESTION: All we have is a dismissal. We have a dismissal, right ?

MR. ELGIN: Yes, but it's part of the dismissal order and it certainly had an intimidating effect on us, particularly in light of the comments on the record a few weeks later in a hearing that we were going to be treated like the Iraqi army in this litigation, and --

QUESTION: Do we have jurisdiction over this appeal ?

MR. ELGIN: I'm sorry ?

QUESTION: Do we have jurisdiction over this appeal ?

MR. ELGIN: Well --

QUESTION: You filed a notice of appeal after you filed a Rule 16 motion.

MR. ELGIN: On the same day, actually.

QUESTION: The same day ?

MR. ELGIN: Yes.

QUESTION: Have you filed another notice of appeal since the 16(b) motion, since that time?

MR. ELGIN: No, because he's done nothing and, frankly, we are afraid of --

QUESTION: How do we have appellate jurisdiction in this case?

MR. ELGIN: Well, if the court holds that we have a right to amend and to seek amendment, I don't guess you do, but the argument on the other side has been that this is one of those cases -- and this is what we are afraid of -- this is one of those cases where, even if amended, we cannot make out a case.

Now, we felt that the opinion rendered below didn't give us guidance on that score. In other words, we felt we had to protect ourselves by noting an appeal at this time, because it was not clear and we feel that the lower court has not gone along with this Court's admonition in the Afshar case and made its line of reasoning completely discernible.

We felt very strongly that the other side was arguing and appeared to be accepted by the court that, no matter what we did to amend this complaint, we could not survive this dismissal, and, therefore, this dismissal was final.

Now, had the court articulated itself below on that point, this appeal would not have been necessary, but under the circumstances, we felt it neessary to protect ourselves by noting an appeal at this time.

Now, I would like to address, if Your Honors are interested -- if you are deciding on that question, perhaps I should not address it, but the --

QUESTION: Do I take it that you are, therefore, conceding that the complaint as presently drafted does not state a cause of action under the two statutes?

MR. ELGIN: I think it's inartful and weak and it is one of the complaints I am least proud of in my entire career. I do think it is amendable. I don't think it is a good complaint. Therefore --

QUESTION: And you are saying in all such circumstances where counsel is dismayed about the complaint, they have a right under the rules to amend it, to make it a better complaint ?

MR. ELGIN: No but I think that the Supreme Court has said in Conley v. Gibson that if you have a case on the merits, you should be allowed to amend and bring it

forward. Now, here we had the Petroleum Act case situation greatly affecting what went on in the civil rights case, in the sense that the deprivation of Federal rights involved was greatly related to what we felt was a decision we were going to obtain in the Petroleum Act case, but which the other side, of course, didn't feel we were going to obtain, and that is the --

QUESTION: I don't understand, why is the Petroleum Act case directly relevant to your failure to plead properly in the first --

MR. ELGIN: Well, it is not an excuse for what I consider the inartful nature of this complaint, in hindsight.

QUESTION: Well, I'm trying to understand. Now, you tell Judge Buckley that you pretty much concede that you can't prevail on the complaint. Now, what is it that you think is the rule of law with

respect to allowance of a motion to amend the complaint, once someone has exposed it as being totally inadequate, and it is not short of absolute, what is it? What's the rule of law?

MR. ELGIN: Well, I believe that, under certainly the -- for instance, let's take your honor's opinion in the Hobson case, particularly on a civil rights complaint, if a proper civil rights case can be made out and properly pleaded, there should be an opportunity to do so.

Now, here let me say that when I first noticed, which was --

QUESTION: There was some confusion in Hobson as to what the rule of law was against which you are raising a complaint, right ?

MR. ELGIN: I'm sorry ?

QUESTION: There was some confusion in Hobson as to what the substantive rules were, so it was not entirely clear what it

was that you had to say in a complaint, more than satisfy it, right ?

MR. ELGIN: Yes.

QUESTION: There is no such confusion here.

MR. ELGIN: Well, confusion --

QUESTION: The substantive rules were all there, you either pleaded or you didn't.

MR. ELGIN: Yes, but the confusion here is that if, in fact, as it turned out to be by the now present decision below in the Petroleum Act case, Vo was simply an intruder, a mere scrambler at the time and had no right, and then all kinds of issues are impacted by that.

In other words, if this station was the franchise of Hoai up until a point where it was improperly terminated by Sunoco and the actual complaint of, then it cannot have been the station of Vo, he cannot have had any color or authority of title

to it. Therefore, this becomes very much like the Lugar situation under 1983, where we have the use of what we feel is an unconstitutional rule in the Superior Court and some related rules and practices there, to affect not just an attachment before judgment, but an actual seizure of the man's property, without the hearing to which he was entitled and any notice, and this is a 1983 violation.

Further, after examining it further, rather than the --

QUESTION: And none of that was understood previously ?

MR. ELGIN: I'm sorry ?

QUESTION: None of that was understood previously ?

MR. ELGIN: Yes, and I think the 1983 case is made out in the present complaint, but I don't think it is very well made out. I mean the language is sloppy langu-

age, I will say that. I acknowledge that, sloppy language, but I think it's there.

Now, in terms of the 1985 case, I feel that we improperly left out a crucial allegation: We did not say this was because of racial prejudice, and we were trying to fit together the second sentence of our causes of 1985 II and 1985 III, in what we felt was an obstruction of justice based on, in effect, accepting what Vo represented, which was within the ethnic group private justice system that he represents, with his threats to break the legs of Hoai, and so forth, and buying off on that and saying, "Mr. Hoai, we don't care about you, we're going to let Mr. Vo and his colleague Thach and their pals take care of you with the particular brand of justice," which is that of a threat and violence, "and we're simply going to eliminate your access and we're going to take this property from you," speaking of

the deprivation of proeprty phase (sic) in the statute, "and you're not going to have the equal justice that all Americans outside of your ethnic group are entitled to," and this is the case that we feel we have and we feel that --

QUESTION: Let me switch you, before your time runs out. I understand what you're saying about what's missing. I think we all can see what's missing in T-85 (sic). In the 83, the heart of your claim, if you were allowed to plead it, is that the D.C. procedure is unconstitutional, as previously written?

MR. ELGIN: Yes, it was changed at the beginning of this year.

QUESTION: Tell me precisely what the constitutional claim is.

MR. ELGIN: I'm sorry?

QUESTION: Tell me precisely what your constitutional claim would be, if you could plead it?

MR. ELGIN: Well, that Hoai was entitled to due process in his rights under the Petroleum Act, principally. He was entitled to notice and he was entitled to a full hearing, a full preliminary injunction hearing, in accordance with the standard procedure, which is the same in the Superior Court as it is under Federal rules, and this is what he was promised by the judge below, and this is what he was deprived of by this maneuver.

QUESTION: Didn't he get full process on the Petroleum Act case ?

MR. ELGIN: I'm sorry ?

QUESTION: Didn't he get full process on the Petroleum Act case ?

MR. ELGIN: I'm not sure I understand the question.

QUESTION: Didn't he get a full hearing on the Petroleum Act case ?

MR. ELGIN: It hasn't gone to trial yet.

QUESTION: Hasn't he gotten summary judgment ?

MR. ELGIN: On liability only, I'm sorry, the damages are --

QUESTION: So, you're getting full process on that.

MR. ELGIN: But we've just had to file a mandamus, because they've taken away all the damages.

QUESTION: But you're in the middle of the process, that is constitutional right.

MR. ELGIN: Yes, the trial is set, yes.

QUESTION: Well, I don't understand, then. If you are getting all of that process, and that's the heart of your constitutional claim, I'm missing something. You're saying that your constitutional argument is that, under the Federal statute, he is entitled to full due process. He's in the middle of that now. However that comes out, he's in the middle of it.

MR. ELGIN: That's right.

QUESTION: All right, so what am I missing ?

MR. ELGIN: Well, there are two questions there. One, while the Petroleum Act, in section 2806(a), appears to at least procedurally preempt, along with the procedural sections of the Act, you have to read them, too, common law claims, it doesn't preempt other Federal claims. Secondly, it only gives the right of action against the franchiser, so if there are other parties involved and they have committed a civil rights violation --

QUESTION: Well, what is the civil rights violation ? I asked you that question, and you said the civil rights violation is that we're entitled to process under the Federal Act. you're getting it now.

MR. ELGIN: No, no, I'm sorry, I said two things. One, we're entitled to due process, in other words, our client was

entitled to a full follow-on preliminary injunction hearing, which he was deprived of by this maneuver.

QUESTION: On what claim ?

MR. ELGIN: On his counterclaims and --

QUESTION: On the Federal statute ?

MR. ELGIN: In the Superior Court.

QUESTION: On the Federal statute ?

MR. ELGIN: No, no, I'm talking about due process on his common law counterclaims that are still in Superior Court.

QUESTION: You're saying the other alleged constitutional violation is -- that is what I asked you 5 minutes ago -- is there something about the D.C. procedure that violates the constitution ? Is that the heart of your claim under 1983 ?

MR. ELGIN: Yes. Yes.

QUESTION: That is that there was an ex parte ?

MR. ELGIN: That's right, the procedure allowed an ex parte procedure, which,

without notification to the most important party, the owner of the franchise, not only attached that franchise, it went beyond that, it took it away from him and effectively destroyed his ability to get it back completely.

THE COURT: Your time is up. I will give you some time on rebuttal, unless there are some other questions.

MR. ELGIN: My red light is on. Thank you.

THE COURT: Mr. Forester ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ., ON BEHALF OF APPELLEES

MR. FORESTER: May it please the Court: Your Honors, appellants claim that they never had an opportunity to amend. That is entirely incorrect. The complaint was served in the court below sometime in november of 1989. The motion to dismiss on behalf of sun refining and marketing was filed on November 29, 1989, and the motion

by Jones-Day defendants was filed on November 30, 1989.

Now, Judge Oberdorfer rendered his decision on October 2, 1990, so they had approximately 10 months to amend the complaint, if it were, in fact, amendable. The motions to dismiss, Your Honors, were simply on insufficiencies out of the complaint, spelled out in detail, why they did not make a claim.

QUESTION: What is your position of the applicable rule on -- was there a decision on the motion to amend ?

MR. FORESTER: The motion to amend, Your Honor, was not filed until January of 1991.

QUESTION: After the fact.

MR. FORESTER: After the fact. This appeal was noted on November 1, 1990, so 3 months later, when the District Court no longer had jurisdiction, they filed a motion to amend.

QUESTION: Do we have jurisdiction in this case, counsel ?

MR. FORESTER: Yes, Your Honor, in my view you do. Jurisdiction is based upon the fact that the final decision to dismiss was issued, filed on October 2, the appeal was noted on November 1, and we argued below that the District Court did not have jurisdiction to hear the rule 60(b) motion.

QUESTION: Because that was filed after the notice of appeal ?

MR. FORESTER: Well, I heard today that they were filed simultaneously, Your Honor. I know they were filed on the same day, but --

QUESTION: What is they were filed simultaneously ? You agree, if the 60(b) motion had been filed before the notice of appeal, we wouldn't have jurisdiction ?

MR. FORESTER: It would not be ripe for appeal, if the 60(b) motion had filed be-

fore. My view is, Your Honor, when you file the notice of appeal and you do it -- say if it were simultaneously, we look up to the Fifth Floor and say this Court has jurisdiction. We believe that is the law.

QUESTION: Do you have any cases ?

MR. FORESTER: We have cases the other way, that the District Court does not have jurisdiction in the area of the 60(b) motion when it is pending up here.

QUESTION: When it's pending, but what about this kind of circumstance, simultaneous, for example ?

MR. FORESTER: I don't have a case on that, Your Honor. I don't know that I've ever seen that situation.

QUESTION: Well, if that's the situation we have, is there any guidance ? Are those in the preferences of the courts ? I mean that is what this case is coming down to.

MR. FORESTER: I can only stress the procedure, Your Honor is that when you note the appeal below, the District Court puts together the jacket and the case comes up here.

QUESTION: If the Clerk's Office also has a 60(b) that's been filed at the same time or maybe an hour before, an argument could be made -- I don't know, I mean I'm just thinking out loud - an argument could be made that they can't put that other jacket together, beause there was a 60(b) filed first.

MR. FORESTER: That certainly didn't come up below, Your Honor. They only --

QUESTION: Well, it wouldn't have come up below, as you are arguing it, and now it is just in the hands of the Clerk's Office, they are just going to march along in different directions.

MR. FORESTER: We went before Judge Oberdorfer on February 1, and he asked us

at that point in time, does the District Court have jurisdiction, and our position was absolutely not.

QUESTION: Well, I have no doubt what your position was, but what else was said, anything ? I mean was the contention made that the 60(b) motion had been properly filed and blocked, or what ?

MR. FORESTER: Your Honor, I know the argument was made, but I don't recall the specifics of that argument, I'm sorry.

QUESTION: But we have an obligation to decide whether we have jurisdiction as an initial matter. We have to make that decision in this case. What Judge Oberdorfer decided is not binding on us.

MR. FORESTER: I realize that, Your Honor.

QUESTION: Well, how can we make that decision, if we don't even know whether the motions were filed -- your brief says they were filed the same day.

MR. FORESTER: That's right, they were filed the same day.

QUESTION: What does the docket sheet show ? Which came first ?

MR. FORESTER: The docket sheet was not filed in the appendix, your honor.

QUESTION: How many volumes were filed in the appendix ?

MR. FORESTER: Five.

QUESTION: Five volumes, and you don't have the docket sheet in there ?

MR. FORETER: Your Honor, I didn't file any of those.

QUESTION: I understand.

MR. FORESTER: I had no input into those five volumes.

QUESTION: You see, in the District Court, when they heard that 60(b) motion in February --I'm sorry, I'm answering a question I'm trying to get an answer to. when the District Court heard argument in February, was it hearing argument on the

60(b) motion to amend and everything else sanctions, they were all --

MR. FORESTER: Your Honor, the sanctions -- the District Court --

QUESTION: Forget the sanctions. Did they hear argument on the motion to amend?

MR. FORESTER: No, Your Honor -- they did, yes.

QUESTION: You see, that suggests that the District Court apparently assumed, beause he's no dummy, he understands that if it was filed after the fact, he had lost jurisdiction, and he seemingly thought he had jurisdiction.

MR. FORESTER: Your Honor, he opened that argument that day by asking if the District Court had jurisdiction, he wanted to hear argument on that. We argued that he did not have jurisdiction. He said then --

QUESTION: And the other side argued that he did.

MR. FORESTER: And then the court assuming I do have jurisdiction, what is your position.

QUESTION: But it is such a simple thing for a District Court judge, especially one that has been around awhile, is not a stupid person, to look and see that the 60(b) was either there or not. If it had been filed 3 weeks later, I suspect Judge Oberdorfer would say you're out, there's nothing to discuss, I don't want to hear any more argument. Apparently that's not what the jacket is going to show us. It sounds like the jacket is going to show us they were filed together.

MR. FORESTER: They were filed the same day, but one will be before the other.

QUESTION: That's right, but now it sounds unbelievable that this case has come to this. We have to write a new rule and we have no guidance from anyone as to what we do in a circumstance where a 60(b)

and a motion to appeal have been filed simultaneously.

MR. FORESTER: I'm sorry, Your Honor, this issue did not come up in any of the briefing.

QUESTION: Well, it did come up, apparently.

QUESTION: Was Judge Oberdorfer asking you about rule 11 ?

MR. FORESTER: No, Your Honor.

QUESTION: He was asking just about the 60(b) ?

MR. FORESTER: About the 60(b).

QUESTION: He had jurisdiction over the rule 11 proceeding, despite the fact --

MR. FORESTER: Yes, your honor.

QUESTION: Even if a valid notice of appeal were filed, he had jurisdiction over that.

MR. FORESTER: That's correct. I didn't get to the merits of my argument that this

complaint is not amendable, and should the --

QUESTION: Go ahead, finish up on that. what is your argument -- I mean I'm not sure how we would get to that if the 60(b) was not properly before the District Court and there was a motion to amend ever before the District Court and that can't be reversible error, so why would you argue it ? If it was before the District Court, then we would have to send it back, because we don't have jurisdiction, so why would we even consider whether it is amendable ? Either the district court had it properly there and if it did, we shouldn't decide it, or it didn't, and if it didn't have the 60(b) before it, then there was no motion to amend and you win, because counsel has pretty much conceded, although he is hedging a little bit on one piece of his case. he is conceding a lot, in terms of what the complaint didn't say.

MR. FORESTER: So, with that concession, Your Honor, and clearly he's saying either it has to be amended or it cannot stand.

QUESTION: Well, at least on a good half of the case. Im going to give him the benefit of the doubt, on one piece he has hedged a little.

MR. FORESTER: Did he hedge on 83 or 85?

QUESTION: 83, I think. if I am wrong, he will tell me on rebuttal. My recollection is that he is hedging on 83.

MR. FORESTER: Well, Your Honor, the gravamen of that argument on 1983 is that the consent order somehow amounted to state action, and, Your Honor, in your opinion as already written, that consent order was nothing more than a private agreement between two parties, and, clearly, Dennis v. Sparks I think applies, a 1980 Supreme Court case, which says that invoking a judicial process does not

transform essentially private conduct into action of the state.

QUESTION: But wasn't it signed by the judge and thereafter enforceable, as such?

MR. FORESTER: Your Honor has already ruled that that was a private agreement.

QUESTION: No, no, keep going, it may have been a private agreement, but I don't know that I ruled on anything with respect to whether or not it was then executed by the court, became a document of the court and thereafter enforceable as a document of the court.

MR. FORESTER: Well, it clearly did become a document of the court, but it is oriented --

QUESTION: Isn't that the theory they would be trying to weave out, if they could amend ?

MR. FORESTER: Your Honor, if they could bring in this unconstitutionality of rule 12(i), which, by the way, was not pled be-

low, they have raised this on appeal for the first time we have heard it.

QUESTION: Well, that's the argument they're making. They are saying you can find it, if you search real hard.

MR. FORESTER: Well, it is --

QUESTION: What was the quotation from -- was it Dennis v. Sparks?

MR. FORESTER: Yes, Your Honor. To quote accurately, invoking a judicial process, of course, implicates the state and its officers, but does not transform essentially private conduct into actions of the state, i.e., --

QUESTION: Is that consistent with Shelly v. Cramer ?

MR. FORESTER: I think so, but they --

QUESTION: Do you want to think a moment again, pause a little bit before you give your answer ? Shelly has a big sweep.

MR. FORESTER: Well, this is a Supreme Court -- they mention injunctions in that

same quote, Your Honor, and they say petitioner's remedy lies in a private suit for damages, which he has had below. there is his due process, as your honor pointed out.

QUESTION: On the Federal game, I understand.

MR. FORESTER: Your Honor, I would respectfully move the admission of Mr. Brian P. Maschler, to argue pro hac vice for the Jones-Day appellees. Mr. Maschler is a member of the Bar of California.

QUESTION: He has just said he doesn't want to bother, now that the case has changed so much.

(laughter)

THE COURT: All right, we will receive him.

MR. FORESTER: Thank you.

THE COURT: Stay within the context in which we have now found ourselves.

ORAL ARGUMENT OF BRIAN P. MASCHLER, ESQ. ON BEHALF OF APPELLEES

MR. MASCHLER: Very well, Your Honor. May it please the Court: My name is Brian Maschler, Jones, Day, Reavis & Pogue law firm, and I represent appellees Jones, Day, Reavis & Pogue, Millard Ottman and David Roseman.

On the jurisdiction question, we argued below at the February 1 hearing that the District Court did not have jurisdiction to entertain either the rule 60(b) motion or the motion to amend which was filed several months after the rule 60(b) motion. We cited to the court --

QUESTION: Which was filed when ? Let me make sure I understand. Which was filed when ?

MR. MASCHLER: The motion to amend was filed, I believe in January 1991. The order of dismissal came down on October 2 of 1990. Those dates I'm fairly certain of.

QUESTION: So, you're saying that the 12(b) was not filed simultaneously ?

QUESTION: 60(b) was filed on November 1st, along with the notice of appeal, correct ?

MR. MASCHLER: That's correct, and we cited to the court a few cases which indicate that, upon perfection of a notice of appeal, the lower court was divested of jurisdiction.

QUESTION: But those cases did not stand for the proposition that the District Court is to decide whether the rule that says once a notice of appeal is filed, the District Court has no further jurisdiction.

MR. MASCHLER: Correct.

QUESTION: But the District Court is not to decide that the notice of appeal was good or bad. That is up to the Appellate Court, that's up to us, and that's the question we are trying to decide. Judge

Oberdorfer would have had no basis whatsoever making a determination of whether that notice of appeal was defective, because the rule is, once it is filed, he loses jurisdiction, only to regain it when the appellate court decides the notice of appeal was defective.

MR. MASCHLER: I understand, your honor. That issue obviously was not before the lower court. The Switzer v. Marshall case indicates that the timing of the rule 60(b) motion vis-a-vis the timing of the notice of appeal is immaterial. Our position today is --

QUESTION: It was immaterial ?

QUESTION: For the District Court's jurisdiction.

MR. MASCHLER: For the District Court's jurisdiction, not --

QUESTION: That's a different question.

MR. MASCHLER: I know, a different issue. Our position is that what is before

the Court today is the legal sufficiency of the complaint as originally filed, the Court's October 2, 1990 order, not the subsequently filed motion to reconsider --

QUESTION: We won't get to it, if there's a 60(b) motion properly there that beats out the notice of appeal. You don't have anything to talk to us about, we would send it back, so you can't --

MR. MASCHLER: Well, these motions are still pending and as --

QUESTION: I don't know what that means. Do we agree that these were filed on the same day ? Is that --

MR. MASCHLER: I think that's accurate, Your Honor.

QUESTION: We don't happen to know who will be home in time, do we ?

MR. MASCHLER: I do not know that. We, in fact - this is an aside - did not receive the notice of appeal until November 27, 27 days after it was filed, so we

briefed the rule 60(b) motion on the assumption that it was validly before the District Court, only to learn later that it was not.

QUESTION: What do you mean, it was not? That you were going to argue that it was not.

MR. MASCHLER: We argued that it was not.

QUESTION: Why ? Based on what ?

MR. MASCHLER: Based on the filing of a notice of appeal the same day, and we can go around and around, and I understand the difference between the two issues.

QUESTION: If the District judge has not decided the rule 60(b) motion and if the appellants withdraw their notice of appeal, then the District judge would clearly have jurisdiction to decide that --

MR. MASCHLER: I would agree with you, Your Honor.

QUESTION: -- After which, if he ruled against the appellants, then they could appeal ?

MR. MASCHLER: That's correct.

QUESTION: So if he says to us today that he wants to withdraw, that's the end of it, right ?

MR. MASCHLER: That's correct, Your Honor. I would argue that --

QUESTION: Just say yes or no. If you want to say more than that, you can wait your turn.

MR. ELGIN: Yes, I would like to say more, but the appeal --

THE COURT: Well, let me hear it, because this is getting out of hand, and then I will let you have the time. Keep track of whatever time is due. Let me hear what he is going to say first, because if they are going to withdraw and you agree that it would then have to go

back, then it seems to me that's what we are going to do.

MR. MASCHLER: Mr. Elgin is going to be heard now, then ?

THE COURT: Yes. You have not lost your time, depending upon what he says.

MR. MASCHLER: Thank you.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ. ON BEHALF OF APPELLANTS

MR. ELGIN: I must apologize that I tried to cover everything here, but I left all my cases on these points, but I know most of them from memory.

Let me say that we have cases, I believe, that govern all of this here in the District. Switzer v. Marshall is --

QUESTION: Forget all of that. Tell the panel this: do you want to withdraw your appeal, because they concede that if you withdraw your appeal, it goes back and the District Court judge has a 60(b) motion, including your motion to amend, yes or no?

MR. ELGIN: Yes, I would be happy to.

THE COURT: Okay, that is it. All right.

Does either side have anything to say in response ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ., ON BEHALF OF APPELLEES

MR. FORESTER: Your Honor, I just want to say that I strongly object to that. We don't concede the question, in answer to Judge Randolph, that if they withdraw. We submit that they noted the appeal, we have perfected this appeal, we have reaped this appeal, we have gone through and indexed five volumes of joint appendices, at considerable time, effort and expense, and we would certainly, if this is withdrawn, we would move this court for counsel fees, at the minimum, but I hope --

QUESTION: Are you speaking for yourself or the Jones-Day --

MR. FORESTER: No, I'm sorry, Your Honor, I'm speaking for Sun Refining and Marketing Company.

QUESTION: I take it that you say you understand, if you move that way, you will simultaneously move for sanctions ?

MR. FORESTER: That's correct.

ORAL ARGUMENT OF BRIAN P. MASCHLER, ESQ. ON BEHALF OF APPELLEES (Continued)

MR. MASCHLER: May it please the Court: these circumstances certainly have not been the subject of briefing or of much consideration. We would respectfully request an opportunity to brief this question. Our position is the question of whether, assuming the rule 60(b) motion was filed before the notice and this court --

QUESTION: But you said you would agree, you tend to agree that if he withdraws the appeal, that it goes back to the District Court.

MR. MASCHLER: Well, Your Honor, it is our position that the October 2, 1990 order of dismissal is properly before this court. Now, I am not in a position to testify to the exact timing of the filings. I would think that burden would rest with appellants. However, as Mr. Forester indicated, the issues with respect to the October 2 ruling have been joined, appellants have conceded that the orignally filed complaint is defective, and if the court wishes to hear argument on why they cannot amend and why their tendered arguments about propriety of amendment are insufficient, I would be happy to offer those.

QUESTION: I just don't see how we can get to them if we don't have a ruling from the District Court on that, and we don't know if the district court had it before them to rule on. how can we --

MR. MASCHLER: It is our position, your honor, that the Court can rule that the lower court's October 2, 1990 ruling was correct, can uphold that order.

QUESTION: That's the dismissal with our consideration of the motion to amend.

MR. MASCHLER: Which was not pending at the time.

QUESTION: That's right, so I don't know why we would -- how can we ever get to the question of the motion to amend ?

MR. MASCHLER: I think the court can determine whether the belatedly filed motion to amend was properly before that court in the first instance.

QUESTION: Only if it's in the context of 60(b), right?

MR. MASCHLER: The motion to amend was filed months after the rule 60(b) motion.

QUESTION: It was filed in January, and the appeal was taken from the October 2nd order, so that whatever the judge did with

respect to the motion to amend cannot be encompassed within the notice of appeal.

MR. MASCHLER: That's correct, Your Honor. It was filed afterwards, and we are having starts and stops on this, and we have been put at a tremendous procedural disadvantage, and it is our --

QUESTION: We are totally sympathetic with that and we understand that. The only question, it seems to me, now is we have got to decide what to do with the 60(b). The District Court either did or did not have jurisdiction over something that was or was not there, and the only question is whether we are allowed the withdrawal of the appeal, and there is one request for consideration of sanctions, if that is allowed, and we will have to consider that, as well. We just want to know what you have to say on that.

MR. MASCHLER: We would like an opportunity to brief that issue, as opposed to make rather --

QUESTION: Why should there be sanctions? If the notice of appeal and the 60(b) motion are filed simultaneously, and if the law is, in that situation, a Federal Court of Appeals does not have jurisdiction, why should there be sanctions ? It was incumbent upon you just to file a motion to dismiss for lack of jurisdiction. You don't have to go through five volumes and index them and then write briefs and then --

MR. MASCHLER: I don't necessarily agree that the court of appeals was divested or deprived of jurisdiction by the act of filing a rule 60(b) motion. I would certainly argue the converse, namely, as we discussed earlier, that the district court did not have jurisdiction to entertain the 60(b) motion upon the filing, due

to the filing of the notice of appeal. That is because the rule 60(b) motion went to matters which were before the court on appeal.

QUESTION: But does that make sense ? The rule 60(b) motion, I take it, was timely filed. It asks the District Court to reconsider its decision, correct ?

MR. MASCHLER: Correct.

QUESTION: If we follow the rule that says no, you can't do that, because on the same day they filed a notice of appeal then the District Court does not have the opportunity to take another look at its decision pursuant to a timely filed motion. Why should that be the rule ?

MR. MASCHLER: Your Honor, the court below did not decide whether it, in fact, possessed jurisdiction to hear that motion. It is our position that it did not. I believe this court is in a position to assess that, and that if the lower court

did not, in fact, possess jurisdiction over the rule 60(b) motion, that the rule 60(b) motion is a dead issue, in effect, and that all that is properly before the court is the legal sufficiency of the complaint as originally filed and, as Mr. Elgin has conceded, was defective in numerous material respects.

QUESTION: There can be a situation where neither court has jurisdiction.

MR. MASCHLER: I suppose I could hypothesize such a situation.

I have nothing further on that issue. if the court is not inclined to entertain the merits of the original appeal, then I have nothing further.

Thank you.

THE COURT: Mr. Forester ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ. ON BEHALF OF APPELLEES

MR. FORESTER: May I just make a suggestion ? If this court goes the direction

it sounds like you are looking at, is there a procedure whereby this court could refer the 60(b) motion to Judge Oberdorfer for a ruling, so that it then comes back to this court, without having to go through what we have already gone through again ?

QUESTION: Well, all you have to do is put new covers on your briefs, if you want.

(laughter)

MR. FORESTER: I suppose.

MR. ELGIN: Gentlemen, may I have a rubuttal here ?

THE COURT: You may have a moment.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ., ON BEHALF OF APPELLANTS

MR. ELGIN: I would like to say that I think these procedural questions are covered. Switzer v. Marshall was mentioned for the first time at the February 1 hearing. That was a decision by Judge Rich-

mond Creech. It was never controlling law, and 11 months later -- and I am sorry I don't have it with me -- Judges Bazelon, Washington and Prettyman of this court, I remember it well, decided that that idea was nonsense, and they went along with Professor Moore's position that it wasted judicial resources and that the better practice was to go ahead and hear the motion below.

But the reason we did what we did was because of the Chastane decision, and I don't have that case with me, but it was Chastane v. Director of the FBI, whoever he was at that time, that was a decision involving the FBI man who was down with his girlfriend in Norfolk and he used his authority, I don't know, to intimidate somebody in a building or something -- at any rate, the point of it was that while it may not be clear what happens when you file these motions, once they have gone

and held the hearing, as he did on February 1, then it would be an abuse of discretion for the lower court not to entertain the rule 60 motion, even if it was arguably not timely or something of that sort.

QUESTION: It would be an abuse of discretion for what ?

MR. ELGIN: For the lower court not to consider the motion for reconsideration fully, beause in the Chastane case, what happened was the guy filed his rule 60 motion, the court sort of encouraged him, and then the lower court said, well, now I've decided you couldn't file a rule 60 motion.

By the way, we tried to file a brief --

QUESTION: Did you do the actual filing of the notice of appeal in the rule 60(b)?

MR. ELGIN: Yes.

QUESTION: Did you personally come down here and do that ?

MR. ELGIN: No, I did not. I just remembered that they were on the same day. I honestly don't remember which one got filed first. I just remember they were filed on the same day.

QUESTION: Did you have one person just take them both down to the Clerk's Office?

MR. ELGIN: I don't even remember that now, I honestly don't. I turned it over to other people. I just don't pesonally remember what happened. I just remember them wanting them filed the same day and that was done.

In the Chastane case, as I say, once the hearing was held, then it was held to be an abuse of discretion not to go forward with the reconsideration motion. We tried to file, by the way, a brief below after the hearing about the decision by Judges Washington, Bazelon, and Prettyman, showing that Switzer v. Marshall had never been law here, and the filing was reject-

ed, because the court didn't want to hear about it.

QUESTION: What, you asked us not to consider the appeal, because we didn't have jurisdiction ?

MR. ELGIN: I asked the court to consider that the position of Switzer v. Marshall was not correct and we had the right to go forward with our Rule 60 below --

QUESTION: Did you ask us not to consider the appeal, because we didn't have jurisdiction ?

MR. ELGIN: No, I did not, because it --

QUESTION: Why didn't you do that ?

MR. ELGIN: Because it wasn't clear to me.

QUESTION: Well, you seem to think its fairly clear.

MR. ELGIN: I'm sorry, I certainly --

QUESTION: It doesn't matter now.

MR. ELGIN: It certainly wasn't clear to me at the outset, let me say. In other

words once he held the hearing, I felt then we had a right to go forward with our motion and he couldn't find some reason to reject it, but, you know, I had to wait until that happened.

THE COURT: Okay. We will take the case under advisement. The case is submitted.

[Whereupon, at 1:30 p.m., the case in the above-entitled matter was submitted.]

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TYPE E APPEAL
JURY

U.S. District Court
USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 89-CV-2397

HOAI, et al v. VO, et al Filed 8/28/89

Assigned to: Judge Louis F. Oberdorfer

Demand: $30,000

Lead Docket: None

Dkt # in other court: None

Jury demand: Plaintiff

Nature of Suit 440

Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

Case type: 1.civil

Thanh Vong Hoai plaintiff	John David Hemenway [COR NTC] 4816 Rodman Street,NW Washington, DC 20016 (202) 244-4819
	Laurence Allnutt Elgin [COR LD NTC] 8929 Sleaford Place Annandale, VA 22003 (202) 628-1114
JOHN D. HEMENWAY	John David Hemenway (see above) [COR NTC]

	Laurence Allnutt Elgin (see above) [COR LD NTC]
DAVID HEMENWAY	John David Hemenway (see above) [COR NTC]
	Laurence Allnutt Elgin (see above) [COR LD NTC]
v.	
THANH VAN VO	Robert James Pleshaw 628-3000 [COR LD NTC] LAW OFFICE OF ROBERT J. PLESHAW 729 15th Street, NW Securities Building, Suite 800 Washington, D.C. 20005
MILLARD F. OTTMAN, JR., defendant	Francis X. Markey 879-3440 [COR LD NTC] JONES, DAY, REAVIS & POGUE 1450 G Street, NW Suite 700 Washington, DC 20005-2088 (202) 879-3939
DAVID C. ROSEMAN defendant	Francis Xavier Markey (see above) [COR LD NTC]
JONES, DAY, REAVIS & POGUE defendant	Francis Xavier Markey (see above) [COR LD NTC]
J. GORDON FORESTER, JR.	

defendant

GEOFFREY WAGNER
defendant

JOSEPH ZULLI
defendant

John Gordon Forester, Jr.
[COR LD NTC]
GREENSTEIN, DELORME & LUCHS
1620 L Street, NW
Suite 900
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SUN REFINING AND MARKETING COMPANY, INC.
defendant

8/28/89	1	COMPLAINT filed summons (8) issued (ew) [Entry date 8/29/89]
11/13/89	-	SUMMONS issued (1) (mf) [Entry date 11/16/89]
11/13/89	2	RETURN OF SERVICE executed as to defendant J. GORDON FORESTER, JR. 11/9/89 by leaving with Ms. Ortiz, Receptionist (mf) [Entry date 11/16/89]

11/13/89	3	RETURN OF SERVICE executed as to defendant MILLARD F. OTTMAN JR. 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	4	RETURN OF SERVICE executed as to defendant JONES, DAY, REAVIS 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	5	RETURN OF SERVICE executed as to defendant DAVID C. ROSEMAN 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	6	RETURN OF SERVICE executed as to defendant THANH VAN VO 11/9/89 personally (mf) [Entry date 11/16/89]

11/13/89	7	RETURN OF SERVICE executed as to defendant SUN REFIN ING/MARKETING 11/9/89 by leaving with Ms Ragby, Secretary in Process Office (mf) [Entry date 11/16/89]
11/22/89	-	CASE REASIGNED to Judge Louis F. Oberdorfer by direction of the Calendar Committee (ajr) [Entry date 11/27/89]
11/29/89	8	MOTION by defendant MILLARD F. OTTMAN, JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS to dismiss as to defendant MILLARD F. OTTMAN, JR.,defendant DAVID C. ROSEMAN, defendant Jones, Day, Reavis Affidavits (3) (ajr) [Entry date 12/1/89]

DON FORESTER, JR., defendant SUN REFINING/MARKETING to dismiss Affidavit (ajr) [Entry date 12/1/89]

11/30/89 -- SUMMONS (1) issued (ajr) [Entry date 12/4/89]

11/30/89 10 MOTION by defendant THANH VAN VO to dismiss. Exhibit (ajr) [Entry date 12/4/89]

12/4/89 11 MOTION by defendant GEOFFREY WAGNER to dismiss (ajr) [Entry date 12/5/89]

12/5/89 12 MOTION by defendant SUN REFINING/MARKET for sanctions pursuant to FRCivP 11 Exhibit (ajr) [Entry date 12/7/89]

12/5/89 13 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 12/20/89 in which

		to respond to various defendants' motions to dismiss (ajr) [Entry date 12/7/89]
12/9/89	14	COPY OF LETTER to Gasch, J. from plaintiff's attorney, John D. Hemenway, (fiat by Oberdorfer, Jr. (mon)
12/8/89	15	AFFIDAVIT OF SERVICE of summons and complaint upon defendants MILLARD F. OTTMAN, JR., (on 12/4/89), DAVID C. ROSEMAN (on 12/1/89), J. GORDON FORESTER, JR., (on 12/5/89), GEOFFREY WAGNER (on 11/21/89, JOSEPH ZULLI (on 11/30/89) (ajr) [Entry date 12/13/89]
12/12/89	16	MEMORANDUM by defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS in re-

sponse to motion to extend time to 12/20/89 in which to respond to various defendants' motions to dis miss [13-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH VONG HOAI, exhibit 1 is a reply in support of their motion to dismiss (cjp) [Entry date 12/14/89]

12/13/89 17 MOTION by defendant JOSEPH ZULLI to dismiss; exhibit (1) (cjp) [Entry date 12/15/89]

12/15/89 18 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 12/20/89 in which to respond to various defendants' motions to dismiss [13-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH

VONG HOAI, respons to dispositive motions due 12/20/89, ; (N) (ajr) [Entry date 12/20/89]

12/19/89 21 MOTION by defendant THANH VONG VO for Rule 11 sanctions Exhibit (ajr) [Entry date 12/21/89]

12/20/89 19 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 1/2/90 in which to file a comprehensive response to defendants' motions to dismiss (ajr) [Entry date 12/21/89]

12/20/89 20 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss

DAVID HEMENWAY in opposition to motion to dismiss [17-1] by JOSEPH ZULLI, motion to dismiss [11-1] by GEOFFREY WAGNER, motion to dismiss [10-1] by THANH VAN VO, motion to dismiss as to defendant MILLARD F. OTTMAN, JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant, motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. Attachments (2) (ajr) [Entry date 12/21/89]

12/20/89 22 REPLY by defendant JONES, DAY, REAVIS to response to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES,

DAY, REAVIS [8-1] by defendant. Attachment 9ajr) [Entry date 12/21/89]

12/21/89 -- SUMMONS (3) issued (ajr) [Entry date 12/21/89]

12/29/89 23 MEMORANDUM by defendants in opposition to motion to extend time to 1/2/90 in which to file a comprehensive response to JOHN D. HEMENWAY, THANH VONG HOAI; Attachment (jda) [Entry date 1/3/90]

1/2/90 24 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY to extend time to 1/16/90 to respond to Rule 11 motions from defendants THANH VAN VO, and SUN OIL (jda) [Entry date 1/5/90]

D. HEMENWAY, plaintiff DAVID HEMENWAY for a stay pending resolution of a question of Federal Rights (cjp) [Entry date 1/17/90]

1/11/90 26 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant. (fiat, OBERDORFER, J.) (ajr) [Entry date 1/17/90]

1/11/90 27 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D.HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [10-1] by

THANH VAN VO. (fiat, OBER-DORFER, J.) (ajr) [Entry Date 1/18/90]

1/11/90 28 SUPPLEMENTAL RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. (fiat, HARRIS, J.) (ajr) [Entry date 1/18/90]

1/11/90 29 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. Attachments (2) (fiat,

OBERDORFER, J.) (ajr) [Entry date 1/18/90]

1/12/90 30 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 1/16/90 to respond to Rule 11 motions from defendants THANH VA VO, and SUN OIL [24-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI response to motion due 1/16/90 for DAVID HEMENWAY, for JOHN D. HEMENWAY, for THANH VONG HOAI ; (N) (ajr) [Entry date 1/18/90]

1/16/90 31 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to stay case indefinitely (ajr) [Entry date 1/18/90]

1/17/90	32	RESPONSE by defendant J. GORDON FORESTER JR., defendant JOSEPH ZULLI, defendant SUN REFINING/MARKET in opposition to motion to stay case indefinitely [31-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ajr) [Entry date 1/19/90]
1/23/90	33	RESPONSE by defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS in opposition to motion to stay case indefinitely [31-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH VONG HOAI (ajr) [Entry date 1/26/90]
1/25/90	34	REPLY by defendant MILLARD F. OTTMAN JR., defendant

DAVID ROSEMAN, defendant JONES, DAY, REAVIS to response to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant. (fiat, OBERDORFER, J.) (ajr) [Entry date 3/29/90]

3/27/90 35 SUPPLEMENTAL MEMORANDUM to motion to dismiss for failure to state a claim upon which relief can be granted and for insufficiency of process [17-1] by JOSEPH ZULLI; Affidavit (ker) [Entry date 3/29/90]

10/2/90 36 MEMORANDUM by Judge Louis F. Oberdorfer (N) (cjp) [Entry date 10/4/90]

10/2/90 37 ORDER by Judge Louis F.

Oberdorfer : dismissin this action, directing plaintiffs' attorneys John D. Hemenway and Laurence A. Elgin to show cause, if any, why they should not be subject to sanctions under Rule 11 of FRCP (N) (cjp) [Entry date 10/4/90]

10/19/90 39 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to order [37-3] with show of cause regarding proposed Rule 11 sanctions; attachment (ker) [Entry date 10/26/90]

10/24/90 38 ERRATA by plaintiff THANH VONG HOAI, re: docket no. 37; Exhibit (4) (ker) [Entry date 10/25/90]

11/1/90 40 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY for reconsider and correct its order of dismissal (ker) [Entry date 11/2/90]

11/1/90 41 NOTICE OF APPEAL by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY from order [37-3] entered 10/4/90; filing and docketing fee $105.00, paid, copies to Laurence Elgin, John Forester, Robert Pleshaw, John Hemenway (ker) [Entry date 11/2/90]

11/1/90 -- TRANSMITTED PRELIMINARY RECORD on appeal [41-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI

to U.S. Court of Appeals (ker) [Entry date 11/2/90]

11/19/90 -- USCA # 90-7170 assigned for appeal [41-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ela)

11/20/90 42 MOTION by defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS for sanctions and MEMORANDUM IN OPPOSITION to plaintiffs' Rule 60(B) motion (kk) [Entry date 11/23/90]

11/21/90 43 MOTION by plaintiff THAN VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 12/14/90 to respond to motion for sanctions (kk) [Entry date 11/23/90]

11/21/90 45 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 12/14/90 to respond to motion for sanctions [43-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (N) (ker) [Entry date 12/17/90]

12/14/90 44 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion for sanctions [42-1] by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR. (ker) [Entry date 12/17/90]

12/28/90 46 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to amend

complaint [1-1]; Exhibit (3), EXHIBIT (AMENDED COMPLAINT) (ker) [Entry date 12/31/90]

12/28/90 47 NOTICE OF FILING by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY of tab 11 to be attached to memorandum in support of their rule 60(b) motion; affidavit (1) (ker) [Entry date 12/31/90]

1/2/91 48 ORDER by Judge Louis F. Oberdorfer : , motion hearing set for 2:00 2/1/91 ; (N) (mon)

1/4/91 49 DEMAND for jury trial by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY (ker) [Entry date 1/9/91]

1/8/91 50 RESPONSE by defendant SUN REFINING/MARKET in opposition to motion pursuant to Rule 60(b) of the Federal Rules of Civil Rules (sic) and motion to amend complaint [1-1] [46-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ker) [Entry date 1/9/91]

1/15/91 51 MEMORANDUM by defendant JONES, DAY, REAVIS in opposition to motion to amend complaint [1-1] [46-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ker) [Entry date 1/16/91]

1/18/91 52 SUPPLEMENTAL to motion for sanctions [42-1] by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR.; Exhibit (1) (ker)

[Entry date 1/24/91] [Edit date 1/24/91]

1/31/91 53 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY for Rule 11 sanctions against defendants Sunoco and Forester (ker) [Entry date 2/1/91]

1/31/91 54 RESPONSE by plaintiff THANH VONG HOAI, plaintiff John D. Hemenway in opposition to motion for sanctions pursuant to FRCivP 11 [12-1] by SUN REFINING/MARKET; Affidavit (1), Exhibit (1) (ker) [Entry date 2/4/91]

2/1/91 55 MEMORANDUM by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in support

of Rule 60(b) motion for reconsider and correct its order of dismissal [40-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI, Affidavit (2), Exhibit (11) "Fiat" J. OBERDORFER (ker) [Entry date 2/6/91]

2/1/91 -- MOTION HEARING before Judge Louis F. Oberdorfer : by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR. motion for sanctions [42-1] heard and taken under advisement, by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI motion for reconsider and correct its order of dismissal [40-1] heard and taken under advisement

reporter: T. Dourian (ker) [Entry date 2/7/91]

2/8/91 56 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to file combined opposition to the rule 11 motion by the Jones, Day defendants after hearing (memorandum in support stricken pursuant to order of 3/18/91, and returned to counsel for plaintiffs) (kk) [Entry date 2/20/91] [Edit date 4/1/91]

2/19/91 57 MEMORANDUM by defendant JONES, DAY, REAVIS in opposition to motion to file combined opposition to the rule 11 motion by the Jones, Day deffendants

after hearing [56-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI; Attachment (1) (ks) [Entry date 2/20/91]

3/18/91 58 ORDER by Judge Louis F. Oberdorfer : denying motion to file combined opposition to the rule 11 motion by the Jones Day defendants after hearing [56-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI; directing Clerk to strike plaintiffs' memo in support of their motion to file an opposition to sprise (sic) argument, etc. (N) (mon) [Entry date 3/19/91]

3/28/91 59 TRANSCRIPT filed hearing on motions for dates of 2/1/91

reporter: T. der Dourian (ks) [Entry date 4/3/91]

3/28/91 60 ENTERED IN ERROR TRANSCRIPT filed of hearing on motions for dates 2/28/91 reporter: T. Der Dourian (ks) [Entry date 4/3/91] [Edit date 4/9/91]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
	)	
Plaintiffs,	)	CA No. 89-2397
v.	)	Judge Louis F.
THANH VAN VO, et al.,	)	OBERDORFER
	)	Magistrate
Defendants.	)	P.J. ATTRIDGE
	)	

[STAMP: United States District Court
District of Columbia Jan 11 11:30PM
'90]

PLAINTIFFS' MOTION FOR A STAY PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS

COMES ON THE PLAINTIFFS, acting through counsel, to move this Honorable Court to stay all action in the above-captioned cause until dispositive cross motions for summary judgment now before this very Court are ruled upon (in: CA: 87-2456). In support of their motion, the plaintiffs offer the Court:

1. Defendant Jones, Day, Reavis & Pogue (hereafter: "Jones Day") and attorney defendants Roseman and Ottman of that firm have argued that there has been no

determination that a federal statute has been violated. Since that is the very issue now before the Court in cross motions, it would appear wise to settle that issue before moving on.

2. The stay of action, moved by the plaintiffs, therefore, would attenuate any duplication of effort, i.e., having to delve into factual patterns more than once, such as whether the agreement between the attorneys of Sun Refining and Marketing Company (hereinafter: "Sun Oil") and the attorneys of Jones Day who represented defendant Thanh Van Vo, violated the Petroleum Marketing Practices Act by the September 8, 1986 consent agreement signed by Jones Day)for Vo) and Sun Oil, which did not have to enter into such an agreement, although Sun Oil has subsequently represented on nearly every possible occasion that this was required by the Superior Court temporary retraining

order or the Superior Court itself, a violation of Hoai's contractual rights and a violation of the PMPA.

3. The requested stay would prejudice no party nor cause any additional burden; on the contrary, it would mitigate the expense of the litigation in the case at bar, which already is into its fourth year.

4. This motion is timely filed. Further, counsel for Sun Oil has complained to this Honorable Court of the amount of effort required to be expended in the PMPA case and Sun Oil already has failed to respond to five different motions raised by the plaintiffs on substantive matters before the Court. These matters involve chiefly matters in which Sun Oil has failed to state in a sworn affidavit matters it wishes to place into the record, no doubt, because counsel for Sun Oil may well know better than the plaintiffs, that

the principal witness upon which Sun Oil relies in the PMPA case, Thanh Van Vo, is demonstrably a mendacious deceiver, capable of any kind of fabrication.

5. As sole practitioners, co-counsel for the plaintiffs ar not unsympathetic to the plight of an overworked attorney, even if Sun Oil's counsel is backed up by a large law firm with resources available far exceeding those of the plaintiffs. Moreover, Sun Oil may not be spending its resources wisely, making lengthy petitions for sanctions against the plaintiffs, who have brought all of their actions in good faith, rather than addressing the merits of the case before them both in the case at bar and the PMPA case (CA 87-2456). Even though the plaintiffs are confident that they will prevail on the merits they certainly do not want to deprive the defendants of a fair chance to present their case, if they have a case. Un-

fortunately, the record in the PMPA case and this and all other actions which the defendants have enjoyed putting on the record (as if crying out for justice and filing in appropriate courts for separate causes of action were wrong) and dodging service in the crassest of fashions, suggests that the defendants want the court to decide on summary actions before the facts can possibly become known to the Court, and thus to prevail by practicing a deception on the Court.

6. Nor do the plaintiffs want this Honorable Court to miss the opportunity to view and set down its views for the benefit of the District of Columbia Bar, in a definitive written opinion and memorandum, <u>in all its raw and naked ugliness</u>, the story of attorneys manipulating distinct minority groups, discriminated against, in order to win lage sums of money themselves and their clients by

using the Rules of this Honorable Court to deceive the Court. Their style has been from the initiation of the first suit by Jones Day to tax the resources of the victim beyond endurance so that his case collapses, not because of lack of merit, but because he has been stomped on and crushed by an economic in this case and will, in the end, fail, if justice prevails and if the plaintiffs are granted a chance to bring out the facts needed by the Court to understand what is going on.

WHERFORE, defendants pray that their motion for a stay will be granted. A stay is requested on all action in the within captioned cause until discovery is complete in Hoai v. Sun Refining and Marketing Co. (CA 87-2456), when that issue, now before the Court, is decided and when the cross motions for summary judgment that are now before the Honorable Court also are decided.

Respectfully submitted,

FOR THE PLAINTIFFS
John D. Hemenway DC#379663
4816 Rodman St., N.W.
Washington, D.C. 20016
(202) 244-4819

Laurence A. Elgin DC#159582
8929 Sleaford Place
Annandale, Virginia 22003
(703) 425-7879

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of January, 1990, he mailed the within-contained motion and attached draft order and memorandum of points and authorities in support thereof, to the following at the addresses indicated below, by first class mail, all postage prepaid.

Jones, Day, Reavis & Pogue
Attn: Francis X. Markey, Esq.
1450 G Street, N.W.
Washington, D.C. 20005

J. Gordon Forester, Jr., Esq.
1220 19th St., N.W. Suite 300
Washington, D.C. 20036

Robert Pleshaw, Esq.
729 15th St., N.W., Suite 800
Washington, D.C. 20005

John D. Hemenway

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
	)	
Plaintiffs,	)	CA No. 89-2397
v.	)	Judge Louis F.
THANH VAN VO, et al.,	)	OBERDORFER
	)	Magistrate
Defendants.	)	P.J. ATTRIDGE
	)	

[STAMP: United States District Court
District of Columbia Jan 11 11:30PM
'90]

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ORDER

This matter came to the Court's attention on the plaintiffs' motion for a stay on any action in the above-captioned cause on the grounds that such a stay is expedient; in the interest of judicial economy until the PMPA cause of action is determined in the related case before this court: (CA-87-2456); and, that such a stay would not harm or prejudice any party with unnecessary delay and would help limit the

time and money expended in this litigation.

Having considered the record and the arguments of the plaintiffs and opposition thereto and having considered the positions of all the parties, in both of the related cases, it is this _____ day of January, 1990, hereby:

ORDERED:

The defendants' [sic] motion is granted. All action on CA-89-2397, Hoai, et al., v. Vo, et al., will be stayed until discovery is complete, if any discovery is granted; and, in connection with the cross motions for summary judgment now before the Court, until after the motions themselves have been decided by the Court.

LOUIS F. OBERDORFER, JUDGE
UNITED STATES DISTRICT COURT

cc to:

(1) J. Gordon Forester, Jr., Esq., Suite 300, 1220 19th Street, N.W., Washington, D.C. 20036;

(2) Jones, Day, Reavis & Pogue, Attn: Francis X. Markey, Esq. 1450 G Street, N.W., Washington, D.C. 20005

(3) Robert Pleshaw, Esq. (For: Thanh Van Vo), 729 15th St., N.W., Suite 800, Washington, D.C. 20005

(4) John D. Hemenway, Esq., 4816 Rodman St., N.W., Washington, D.C. 20016; and,

(5) Laurence A. Elgin, Esq., 8929 Sleaford Place, Annandale, Virginia 22003

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)CA # 89-2397
Plaintiffs.)Judge Oberdorfer
v.)[STAMP: USDCDC
THANH VAN VO, et al.,)Jan 11 11:30PM
Defendants.)'90]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF: PLAINTIFFS' MOTION FOR A STAY PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS

I. DEFENDANTS ROSEMAN, OTTMAN AND THE LAW FIRM OF JONES, DAY, REAVIS & POGUE PROFESS TO BE UNAWARE THAT THEY VIOLATED ANY FEDERAL STATUTE:

The above defendants argue that:

> "As admitted in the Complaint, none of the plaintiffs was a party to this consent order; indeed, it explicitly excluded plaintiffs from its reach. Accordingly, the pendency of the consent order impaired no legal right of plaintiffs whatsoever ..." (p. 28, Memorandum of Defendants Millard F. Ottman, Jr., David C. Roseman, and Jones, Day, Reavis & Pogue In Support of Motion to Dismiss" hand delivered on November 30, 1989, hereafter identified as "Jones,Day Memorandum".)

This argumentation is disingenuous. It must be obvious to Jones Day Reavis & Pogue (hereinafter: "Jones Day") and its attorneys that it is quite possible for

two parties (in this case Sun Refining and Marketing Co., hereafter: "Sun Oil" or "Sunoco") to reach a bilateral contract the terms of which are harmful to third parties as is alleged in this case. The consent order was nothing more than a bilateral contract. As alleged in the related case before this Honorable Court captioned: THANH VONG HOAI V. SUN MARKETING AND REFINING CO., U.S. DIST CT (DC), CA: 87-2456, the so-called "consent order" of September 8, 1986, terminated the Hoai franchise, thereby preventing Hoai's earning a livelihood from that source.

The three defendants do not seem to grasp that the temporary restraining order to which they refer lasted for ten days only and ceased to exist more than three years ago. The TRO has no binding effect upon any of the parties to the earlier, related case or to any of the parties of the case at bar. Neither did the

temporary restraining order recognize any status quo, as alleged by the three defendants, for temporary restraining orders do not confirm status quo, preliminary injunctions are for that purpose. There was no preliminary injunction given in the Superior Court case fallaciously invoked here by Jones Day, and attorneys Ottman and Roseman, so Jones Day and its attorneys are raising matters ot applicable here. Even if TROs could determine the status quo, which they can not and do not, in any event, a status quo can only be recognized if it is the last uncontested status. See: Westinghouse v. Free, (CA7) 256 F.2d 806. Further, the so-called "consent order" which Sun Oil claims grew out of the allegedly court-confirmed status quo (which is not a function of TROs as mentioned) was not a product of the Superior Court, but of Jones, Day Sun Oil and their attorneys. The

United States Court of Appeals for the District of Columbia has ruled that "The consent order did not represent an exercise of the Superior Court's independent judgment and Hoai has not attacked that judgment." Hoai v. Sun Refining and Marketing Company, Inc., 275 U.S. App. D.C. 397 (1989), at p. 401.

Even Sun Oil's preposterous assertion that the consent agreement confirms the status quo established by the TRO (blandly ignoring the fact that injunctions, but not TRO's, can establish what was the status quo) presumes that the TRO obtained by Jones Day and Sun Oil for Thanh Van Vo was legitimate, when, of course, it was not. To cite merely one problem: the bond which was a requirement was never paid during the entire life of the TRO. Further, no effort was ever made to decide any of the issues on the merits; when the TRO expired after 10 days, its effects

would have expired, too, had it not been for the scheme arrived at by Roseman, Ottman, Jones Day, Sun Oil and the attorneys representing this grand coalition of a large oil corporation and a large law partnership, who arranged the contractual deal for Thanh Van Vo as if under the color and authority of D.C. law. Yet it was a contract calculated to circumvent and to violate the Federal Petroleum Marketing Practices Act, 15 USC 2806 et seq.

At the TRO hearing, defendant Ottman had pledged to meet the "cash" bond by his own check (permission the judge gave only when Ottman claimed that the late hour prevented meeting the term of $3,000.00 "cash".) This was a necessary condition of the TRO. Ottman did not pay his own check into the register, nor did he draw on the account from Jones, Day. Instead, this Jones Day attorney had the street

"scrambler" (as Prosser would call him) who had no legal claim to the station, Thanh Van Vo, put up a check drawn on proceeds earned by the station that same Vo had illegally seized control of from Hoai. And the check for $3,000.00 he wrote payable to the Clerk of the Superior Court, District of Columbia, bounced, to boot. Jones Day had to know it had violated the terms of the TRO, yet it did not report that fact to the Court. Nor did it report to counsel for Hoai. Even the so-called "consent decree" required the continuation of the TRO bond and this could not be done, for there was no bond.

In short, the entire TRO operation was a fraud upon the court and the fact had to be known to attorneys Ottman and Roseman and their law firm, Jones, Day, for they personally violated the condition imposed on the TRO by the Court, i.e., a "cash bond" (check from Mr. Ottman allowed to

substitute.) The record from the Superior Court of the District of Columbia (Vo v. Sun Refining and Marketing Co., et al., 275 U.S. App. D.C. 397 (1989) has not yet been properly introduced into this court, which should be done, if the defendants seek to use the operation in that court in their defense. Until this is done, final action on the defendants Motion to Dismiss should be put off for this reason alone, justifying this motion for to stay action until dispositive motions in CA-87-2456 are dealt with. The original cause of action, brought by Thanh Van Vo against Sun Oil and Hoai and others in 1986 started this chain of litigation, of course, in the Superior Court of the District of Columbia (CA-7075-86) which action still continues. It is now placed on a stay by Judge Kennedy pending resolution of the PMPA questions in this Honorable Court. It is fair to say that the attorneys guid-

ing the filing of Thanh Van Vo's original complaint, with the help of attorney Michael Arif, Vo's attorney, had to violate a contract of settlement arrived at between Vo and Hoai, under the terms of which Ernest Peele of Sun Oil would decide who would get possession of the station (Peele decided for Hoai, in the presence of Vo and Hoai and their attorneys) and, following the settlement of that issue, a settlement payment to whomever money was due would resolve all other matters, following an inventory. The inventory was under way when Jones Day violated this settlement contract by advising Vo to sue Hoai. A motion asking for injunctive relief on these matters is pending in Superior Court of the District of Columbia, stayed by the action of Judge Kennedy.

Jones Day and Sun Oil have dragged a number of matters into this purely PMPA federal action better resolved in the Su-

perior Court where they began, and which court is seized with the action. If the defendants Jones Day or Sun Oil choose to argue the instant case from the record of the Superior Court of the District of Columbia, or appeals to the Court of Appeals of the District of Columbia, then they should introduce the record of that Court in significant context, so that this Honorable Court may refer to that record.

The substance of the problems that are introduced by dragging in allegations long adjudicated in and pertaining to a proper state function (i.e., the D.C. Court) are complicated and are addressed in the several motions recently filed in both actions before this court. The unnecessary time and effort and complication introduced by the defendants (in both actions) attempting to retry matters already resolved or before the Superior Court should be avoided by granting this motion.

Suffice it to say, that, in effect, the defendants violated a federal statute by agreeing to a de facto termination of Thanh Vong Hoai's franchise by means of a bilateral contract concluded with Thanh Van Vo which the defendants clothed in the color and authority of the laws of the District of Columbia by claiming that their bilateral contract was a "consent order" which they claimed to cite only to preserve.

The complaint in the case at bar has nothing to do with a lawyer's traditional function (Defendants' Memorandum of Points and Authorities in Support of Motion TO Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted, served November 29, 1989, p.29 and generally, hereafter: "Memo") and the claim that Jones Day "secured this interim relief on behalf of their client" (Memo, p.2) or that Jones Day attorneys were merely law-

yers who "functioned solely as advocates for the interests of their client" (Memo, p.4). Rather, it has much to do with the violations of ethical standards, federal laws and the misrepresentation of the facts to the courts in an attempt to give the color of law to illegal actions that would have been defeated or without effect had they been attempted in the open, above board, such as the ex parte presentation of the so-called "consent order" that lacked the consent of three out of five parties in the case, which was based on a fraudulently obtained TRO (see above). More recently, in the plaintiffs' filing of January 2, 1990, on pp. 16-17 of the "PLAINTIFFS' OPPOSITION TO THE DISMISSAL MOTION OF DEFENDANTS ROSEMAN, OTTMAN AND JONES, DAY, REAVIS AND POGUE," it is noted that:

> "... the Petroleum Marketing Practices Act, 15 USC 2801 et seq., at 2808, specifically forbids a refiner of branded products who sells them to retailers as Sunoco did here to terminate a franchise except for one

of the five specific reasons set out in the PMPA at Section 2802, with the notice required by Section 2804 of Title 15. As this Court well knows by this time also, the officials of a major refiner covered by the PMPA, such as defendant Sunoco, are charged with a knowledge of that Act. But so is every member of the federal bar. As the testimony referred to supra of Mssrs. Peele and Vaughn and the admissions of defendant Forester in the PMPA case, together with summary alluded to in Attachment one [to the filing of January 2, 1990, entitled: PLAINTIFFS' OPPOSITION TO THE DISMISSAL MOTION OF DEFENDANTS SUN REFINING & MARKETING COMPANY, INC. AND J. GORDON FORESTER, JR."] make it abundantly clear that the actual decision-making officials of the defendant Sunoco had no conscious idea at all that they were doing anything, in giving the gas station franchise to the defendant Vo, other than obeying the order of the Superior Court as it was represented to them by the [attorney] defendants Wagner, Zulli and Forester. It is evident from the testimony that they never even thought of terminating plaintiff Hoai properly under the PMPA. Thus these defendants were, in making the false representation to the responsible Sunoco counsel and officials that they did make, acting consciously pursuant to the law of the District of Columbia concerning the orders of its courts that gave the defendants aid and comfort in making these false representations to the Sunoco officials who did, based on this information, act to destroy the franchise of plaintiff Hoai and harm the other two plaintiffs who had

committed to Hoai's cause."

II. IN DRAFTING THE ORIGINAL COMPLAINT FILED AUGUST 27, 1986 AND THE AMENDED COMPLAINT, ALLOWED BY THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ON MARCH 24, 1987, JONES DAY REAVIS AND POGUE AND ITS ATTORNEYS KNOWINGLY INCORPORATED THE FRANCHISE AGREEMENT BETWEEN HOAI AND SUN OIL DEMONSTRATING THEIR AWARENESS OF RELEVANCE OF THE P.M.P.A. FEDERAL STATUTE.

It is difficult enough for a major oil refiner to argue ignorance of provisions of the PMPA, but Jones Day submitted its August 29, 1986 Complaint on behalf of Thanh Van Vo, using its firm name and incorporating the Franchise Agreement signed by Hoai and Peele on March 31, 1986, as Exhibit No. 1. That exhibit mentions the PMPA on the top of the very first page giving the title and chapter of that federal act. Thus, Jones Day illustrated its full knowledge of the existence and application of the PMPA provisions of the law. Their protestations of ignorance of federal laws and constitutional provisions

of due process and ethical acts allegedly violated do not ring true.

III. EVIDENCE OF RACIAL DISCRIMINATION AND "BENIGN" NEGLECT OF A DISPUTE THAT WAS PURELY "BETEEN TWO VIETNAMESE" IS MORE EFFICIENTLY DEALT WITH AFTER THE COURT DISPOSES OF THE CROSS MOTIONS NOW BEFORE IT DEALING WITH TWO MOTIONS FOR SUMMARY JUDGMENT.

From the begininning of this action in this Honorable Court, Sun Oil took the position that they were mer "stakeholders" in a problem that had come between two squabbling Vietnamese, Hoai and Vo. It would take a major sociological analysis of that position to fully expose its essential racism. Plaintiffs have begun such a discussion in their attachment two to the Plaintiffs' Response to Defendants' Motions to Dismiss, filed January 2, 1990 (see especially the first six pages of the 21 page attachment.)

This posture by Sun Oil immediately raised two fundamental questions: (1) Why is is that a United States citizen of

Vietnamese origin, i.e., Hoai, should not have full due process before the United States Courts [for that matter, an alien who has found himself in the United States]; and, (2) Why is an American citizen of Asian origin less able than any other American citizen to be presumed unable to borrow money to finance a business, i.e., why should loan arrangements between Thanh Vong Hoai and Thanh Van Vo, solemnized by assurances made before Sun Oil's own corporate representative Ernest Peele, who was charged by his employer, Sun Oil, with the specific task of investigating the propriety of the financial arrangements, suddenly become not a loan, but a squabble among two Vietnamese. Could it be that Peele was considered unsuitable to represent Sun Oil in a District of Columbia trial because he is a Negro American and his obvious veracity would be taken by a District of Columbia

jury as self-evident ? It was J. Gordon Forester, Jr., counsel for Sun Oil, who introduced the racial overtones of Sun Oil's argument. Forester put it thus:

> **"This is a dispute between two Vietnamese nationals who once were friends .... Mr. Vo had previously been a student in this country which gave him a better command of the language. He testified that he assisted Mr. Hoai in becoming adjusted." (Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Jugment., in Hoai v. Sun Refining, CA 87-2456, DCDC, p.1., paragraph 1, line 1.)**

At the very end of the same document, Sun Oil repeats the same argument:

> **"This dispute between two former friends and compatriots has generated enough litigation to fill a lifetime or tow; [sic] yet the facts are clear and most are not in dispute." (ibid. p. 18, para two, lines 1-3.)**

The above statements (supported by no sworn affidavits) are simply false in nearly every respect. Sun Oil's counsel Forester once advised Hoai's counsel John Hemenway against submitting lengthy depositions into the Superior Court record, for he had found such a practice

inadvisable. Clearly, in this case, Forester does not like affidavits at all--he prefers self-serving documents that can be interpreted in several ways with no liability incurred by the counsel introducing them. With respect to the statements cited above, it is a fact, that both Hoai and Vo are American citizens, and their Asian background is relevant to this case only to the extent that it has become an object of discrimination with respect to Thanh Vong Hoai and those supporting him. With respect to English competency, there are two sworn affidavits of the plaintiff Thanh Vong Hoai submitted by persons who knew him and his work in the American Consulate General in Da Nang.

(TAB #8, **Sworn Affidavit of Pastor Nga (peter) Nguyen, September 27, 1989, in the series filed October 12, 1989, docket numbers 103 and 142.**) Clearly, Hoai needed no help from Vo as a translator and he did

not request such help. With the help of Jones Day attorneys, this mythical (and prejudical) relationship was built into the flimsy shell of American-trained attorneys coaching Vietnamese clients into signing sworn affidavits that might "sell" an TRO to a hurried judge. And it worked on August 29, 1986, and has been a legal nightmare for Thanh Vong Hoai ever since, dispossessed from his service station by the joint action of Sun Oil and Jones Day, based on the perjurious affidavits Jones Day prepared and continued with the consent agreement of September 8, 1986. When the matter was removed to a federal court, in 1987, then as now, Jones Day (and Sun Oil) claimed there was no federal question. Therefore, when the specifically PMPA federal action against Sun Oil was commenced, virtually the first words that were uttered by counsel for Sun Oil to this Honorable Court were that Sun Oil was

a mere stake-holder in a squabble between two Vietnamese. This is as close to a racist statement as one might make in law. In effect, Sun Oil has attempted to exploit the myth that loans to raise capital, and enforcement of contracts were only for real Americans, but arguments between two individuals of Vietnamese extractions are mere racial squabbles between Asian ethnics about which the court need not be concerned. (like the Tong Wars? One Superior Court Judge evidenced his insight by making such a reference in open court. Please see the sociological observations in Attachment #2 to Plaintiff's Response to Defendants' Motions to Dismiss, especially section on "prejudice and stereotyping", filed January 2, 1990.) This lack of candor on the part of Sun Oil has misled this court into a situation which ultimately had to be corrected in the U.S. Court of Appeals.

But to its great credit, this Honorable Court was not confused about what was going on. Right from the start, this Court refused to be lulled into complacency by the siren's song of Sunoco's counsel Forester. This Court recognized the fact from the start that counsel for Hoai were asserting that, in effect, Sun Oil was not a mere stake-holder, as asserted, but had actually decided between the contending parties, and had, in fact, decided for Thanh Van Hoai. This was quite correct, of course, and in fact, Sun Oil was never neutral after September 8, 1986, when it signed the so-called "consent agreement" with attorneys of Jones Day, which trashed the franchise agreement Hoai had had with Sun Oil. It was an attorney-assisted "sell out" of Mr. Hoai's interests, accomplished without any notice to him or to the other parties, or without full information to the Court asked to

rubber stamp the contractual arrangements between the two consenting parties, Sun Oil and Vo. To this Honorable Court's everlasting credit, it refused to be deceived by the fact that Sun Oil was putting on this arranagment which was illegal under the PMPA and assured Hoai, ultimately, of receiving his day in Court.

However, the defendants named in this action, certainly all did their utmost to lure the Court into a trap by exuding the appearance of an agreement "having judicial origins" as Mr. Roseman might have put it[1] Roseman and Jones Day did much

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[1]1 Roseman did put this concept in the negative with regard to Mr. Hoai's Notice to Surrender the Premises, which was but another effort of Jones Day attorneys to insinuate that action of Mr. Hoai and the persons supporting him were illegal, while those of the street scrambler who was being coached to put false statements in the form of sworn affidavits by Jones Day attorneys, were being clothed in the color and authority of state (i.e., District of Columbia) law. See pleadings of Superior Court, Verified Complaint of August 29, 2986, and the amended verified Complaint lodged earlier, but filed with permission of Superior Court on March 24, 1987.

more than that. A false construction was put on every move by Mr. Hoai and his supporters to suggest that they were mavericks who would throw papers in the face of trusted retainers of Jones Day, rather than serve papers as gentlemen/attorneys are expected to do. Attorney Roseman fabricated such materials, in the belief of Thnh Vong Hoai out of prejudice and the keen desire to earn a fee from Thanh Van Vo, regardless of the source of the money to pay that fee. A sizeable amount of those payments were funds stolen from Mr. Hoai's station, as the checks written on the station account indicate.

To his personal credit, Jr. Gordon Forester, Jr. has privately told attorney John Hemenway that he personally did not believe the charge leveled against Hemenway by Roseman to the effect that Hemenway

was culpable of stealing some $7,000.00 in cash which Thanh Van Vo asserted he had hidden in the station[2] However, he never

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[2]2 If one believe Vo's story, he put this $7,000.00 in a secret place. [Evidently he did this without telling anyone where this secret place was, so it is difficult to understand how anyone could use the money as an agent of his in his absence.] Vo claims to have done this immediately prior to departing for Canada where, when needed, he was promptly located by "beeper". To Mr. Hoai and his suporters, this souns more like the actions of a drug-dealer than a typical District of Columbia filling station operator. Especially when you reflect on the fact that there were <u>not one but two</u> **safes on the premises, one concealed and the "secret place" was in a decrepid desk drawer that could not even be locked.** Vo further claims that the money was needed to pay for gasoline shipments. However, this does not ring true, either, for Sun Oil no longer would accept anything in payment for gas shipments except certified checks, because Vo's deceitful action in not advancing the loan of $35,000 he claimed to Sun Oil's Peele and Hoai himself when all three met to discuss the matter resulted in a bounced check. Sun Oil called Hoai to tell Hoai that <u>only</u> certified checks would be accepted. <u>No cash</u> because of the danger of robbery and violence against the drivers of the gasoline transport trucks. Yet, Roseman, Ottman, and Jones Day continued to press this patently false charge, sullying the professional reputation of John Hemenway, David Hemenway and Thanh Vong Hoai, when any competent analysis would have revealed

has placed anything in the record to record his own personal distaste for attorneys like Roseman and Ottman using this kind of false swearing and use of innuendo to blacken a fellow attorney's name. On the contrary, he has watched, for three years, a proceeding which has been permitted to drag on because of his own actions in formulating a "settlement" with a man (Thanh Van Vo) with whom there should have been no settlement or legal compromise.

Judge Eilperin surely was not alerted to the PMPA implications of the order by either of the two parties (two out of five) who were promoting the consent order. Rule 54(b) of the Superior Court is

(Cont.)

the dubious nature of the charge. Seen in the overall picture, Jones Day and its attorneys kept these falsities in the complaint to blend into their total orchestration that their client was acting under the color of law, while Hoai and his suporters were capable of thievery.

the same Rule 54(b) of the Federal Civil Rules of Procedures and applies in multi-party cases. There was no Rule 54(b) determination and direction as mandated by that rule here. This shows that Judge Eilperin, though he may have been negligent in letting himself be tricked by Mr. Vo's attorneys, was not consciously in any way making a judgment or decree or issuing an order as opposed to approving a consent order. It was a situation that would concern most judges who surely hope that attorneys before them are candid and forthright, and careful not to conceal the full truth from the Court. And so, there was no judgment here, only consent, and, by Rule 54(b), the action was not terminated as to any claim or party. All that Judge Wagner did was to impose a TRO. If we leave all of the error which plaintiff Hoai claims was connected with that TRO aside, it still was only a TRO

more. Ten days and out. Perhaps Judge Wagner thought that she was restoring a status quo. If so she missed the mark badly. A status quo is defined in federal practice, for purposes of preliminary injunctions, as opposed to temporary restraining orders, as the last actual, peaceable, noncontested status which preceded the controversy before the Court. Westinghouse Electric Corporation v. Free Sewing Machine Co. (CA7 1958) 256 F2d 806. No such standard has been enunciated for TRO's and it is not the case that the imposition of a TRO, as a matter of law, infers that there has been a determination as to what the last peaceful uncontested status between the parties was. Such a determination is a standard for preliminary injunction proceeding and from a preliminary injunction's being granted, such a holding can perhaps be inferred, though even that is subject to challenge.

It certainly does not appear from the TRO proceeding before Judge Wagner that she took that preliminary injunction standard into account in the TRO proceeding in the Superior Court at issue here. Quite the opposite, in fact. If the transcript of that hearing were properly admitted in this case[3] it would show that in her obsession with imposign upon the proceeding concepts of "wrongful eviction" (not thought of or raised previously by the parties), she ignored clear, corroborated, uncontradicted testimony of Vo's threatening to murder and otherwise commit

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[3]3 We note that defendant, in a distorting and improper fashion, has attempted to introduce misleading little bits of evidence from that proceeding, improperly seeking to use them as "facts" to support its motion and its opposition without properly introducing the transcript in its entirety or in the entirety of the relevant passages so as to cure the distortion and has done so, moreover, with regard to the plaintiff, whom it extensively deposed in this proceeding without being able to elicit testimony it could as easily distort, thereby violating a host of rules.

violence upon plaintiff Hoai. So it is evident that Judge Wagner acted completely obliviously to this important standard for preliminary injunctive relief in federal practice. No doubt Superior Court Judge Wagner thought that was all part of something that could be taken care of later at a preliminary injunction hearing and all she was concerned with was that a landlord not wrongfully evict someone.

The defendant Sunoco, having now been completely disabused of its theory that a consent order, in defiance of logic and the plain meaning of the term, was dictated to it by Judge Wagner, is trying to fall back in some vague and unarticulated fashion on a theory that if the consent order was not compelled, as it had represented to this Court, then it must be that plaintiff Hoai, while not collaterally attacking the consent order improperly,

is somehow improperly attacking collaterally the TRO. This is nonsense. One does not collaterally attack or not attack a TRO. They don't last long enough. When a party obtains one and then abandons it, as was here done by Vo with regard to Hoai, then it is as if the TRO never existed. It has no precedential value whatsoever.

The defendant and its counsel again try to misrepresent the situation to the Court and confuse and mislead he Court into another unjustifiable decision. Sunoco purposefully seeks to confuse the difference between a TRO and a temporary injunction.

They are not the same. A TRO absolutely goes no further than to preserve what the judge in question perceived as the status quo until the determination attendant upon a full hearing for a preliminary or temporary injunction. See Am Jur 2d "Injunctions" Sec. 10, "Restraining or-

ders.", especially the cases cited in note 10. If there is no such follow-on hearing and decision then the TRO expires and it is as if it never was. There is authority that, unless it is void a temporary injunction, as opposed to a TRO, even if that preliminary injunction is erroneous, is not open to collaeral attack, while it exists. AmJur 2d, Loc. Cit. Sec. 318, "Conclusiveness generally", and authorities cited at n. 9.[4] There is no

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[4]4 It should be pointed out here that if it should be tried as an issue, it was the case in the Superior Court that the plaintiff Vo there "paid" for the bond set as a condition of the TRO by Judge Wagner in the TRO (tab 36-c of the collation of documents filed by the plaintiff on October 12, 1989) with an NSF (not sufficient funds) check drawn on the account of the gas station, which "bounced". See tab number 36-a of collation of documents filed by the plaintiff on October 12, 1989, in conjunction with the pending summary judgment motions. As the exhibit shows the check was never made good until long after the TRO had expired as to plaintiff herein and his fellow individual co-defendants in that case, the Hemenways. Since the bond was never posted the TRO was void.

authority that a TRO canot be collaterally attacked and there is no authority that a preliminary injunction or a TRO can't be criticized and their findings disputed after they have expired, especially where the party obtaining them let them expire. Yet here that appears to be Sunoco's continual argument, that plaintiff is improperly collaterally attacking a TRO.

It has taken three and one-half years to get to the stage of these proceedings in which there are motions before the court for summary judgment and two motions by the plaintiff that request more discovery against the defendant Sun Oil prior to any favorable ruling on the summary judgment motion of Sun Oil. There is certainly no need to interrupt this orderly conduct of the court's scheduled procedure to take dismissal motions out of order concerning the civil rights suit at bar.

The defendants claim that no federal statutes have been violated and therefore the suit against them should be dismissed. That matter is about to be determined by the discovery and summary judgment motions now before the court. In the interests of judicial economy and truth and justice, the prior actions before this Honorable Court should be considered first. Then all parties will know with some certainty how the Court intends to deal with the validity of the charges that the PMPA violations are valid. In the view of the plaintiffs this should effect a great economy on the time and energy the Court should anticipate will be expended in the case at bar.

WHEREFORE, the plaintiffs pray that their motion be granted to stay further proceedings until the Court concludes action on the cross motions for summary judgment and motions for discovery and re-

tion on the cross motions for summary judgment and motions for discovery and related motions to strike evidence and to rule as conceded various motions which defendant Sun Oil has not even bothered to file opposition.

Respectfully submitted
FOR THE PLAINTIFFS
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al. Plaintiffs	)CA No. 89-2397)Judge OBERDORFER
v.	)
THANH VAN VO, et al. Defendants.	))

PLAINTIFFS' MOTION FOR AN INDEFINITE STAY

Clerk will please note: This motion impinges on the Rule 11 Motions filed by Defendants Thanh Van Vo (Docket No. 21) and Sun Oil (Docket No. 12) and has an effect on the Plaintiffs' Motion for a stay filed on January 11, 1990.

Comes now the plaintiffs, through counsel, to move this Honorable Court to place an indefinite stay on the action in the above captioned case, pending resolution of the petroleum marketing products case (CA No. 87-2456, Hoai v. Sun Oil) now before it.

In support of its motion, plaintiffs offer:

(1) A Report on the status of the other case (CA-87-2456), well known to this Court, which has ordered a hearing in the

case in three days, on January 19, 1990; (2) reasons why judicial economy will be promoted by granting the plaintiffs' motion; and (3) a memorandum of points and authorities.

For the convenience of the Court, an appropriate draft order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of January, 1990, he mailed the within-contained motion with attachments to the following at the addresses indicated below, by first class mail, all postage prepaid.

Jones, Day, Reavis & Pogue
Attn: Francis X. Markey, Esq.
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John D. Hemenway

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al., Plaintiffs	)	CA No. 89-2397
v.	)	Judge OBERDORFER
THANH VAN VO, et al., Defendants	)	

==========

ORDER

Plaintiffs move for an indefinite stay of all action pending resolution of a related petroleum products marketing case (CA-87-2456) which is now before this court.

It appears that judicial economy will be served by such a stay which will permit a determination of at least some of the issues in the related case that are logically determined prior in time to this case and since the stay will prejudice the interests of no party, it is this _____ day of January, 1990, hereby:

ORDERED: The plaintiffs' motion is granted. There will be an indefinite stay

on all action in this case pending a further order by the Court on the subject.

LOUIS F. OBERDORFER, JUDGE
United States District Court

cc:
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs) CA No. 89-2397
v.) Judge OBERDORFER
THANH VAN VO, et al.,)
Defendants)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF: PLAINTIFFS' MOTION FOR AN INDEFINITE STAY

1. Attorney Forester (a defendant in the case at bar) who is also counsel for defendant Sun Refining and Marketing wrote to this Honorable Court on November 14, 1989 claiming that the case at bar is related to CA 87-2456, Hoai v. Sun Refining and Marketing Co. That letter inaccurately and prejudicially sets out common issues and events, but it is true that there are common issues of fact. (The Forester letter does not appear to be on the docket, but reassignment of the case is posted as November 22, 1989.)

2. Subsequently Forester filed a motion for Rule 11 sanctions against the

plaintiffs for having brought the suit. This motion is premature, to say the least, but it was joined by Mr. Pleshaw (representing Thanh Van Vo here and in CA-87-2456) who submitted a second copy of the Forester Rule 11 motion over his own name and asked for sanctions, too. Rather like panning for gold on the other fellow's claim, especially since the complaint was filed for good and valid cause. Further, over the past ten years, the case law on Rule 11 sanctions has expanded enormously as pointed out by the plaintiffs in their "MOTION FOR ENLARGEMENT OF TIME OF 14 DAYS IN WHICH TO RESPOND TO RULE 11 MOTIONS FROM DEFENDANTS THANH VAN VO AND SUN OIL". The arguments for deferring action in that matter as set forth in that motion clearly pertain and are incorporated by reference in this memorandum.

3. In any event, any Rule 11 action is dependent on the defendants being successful on the merits, and the plaintiffs are confident that the defendants will not be successful on the merits.

4. On January 12, 1990, the law clerk of this Honorable Court called to announce that Judge Oberdorfer would convene a hearing in the matter of Hoai v. Sun Refining on January 19, 1990 at 10:00. As of this writing, no order has been received as to a specific agenda, but clearly the outcome of that hearing will impact heavily on the case at bar and, further, that results of decisions made at that hearing, depending upon what is decided, may not be known immediately.

5. In the case at bar, several defendants have claimed that there is no federal issue. Plaintiff's responded to that claim with their motion filed January 11, 1990: "PLAINTIFFS' MOTION FOR A STAY

PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS". Since the arguments contained therein appear to apply to this request for an indefinite stay, the arguments therein are also incorporated by reference for economy.

6. It appears that there is a certain logic in resolving the PMPA case first (which is a federal question) before taking up the arguments of Jones Day and other defendants that the plaintiffs have not raised any federal questions in this, a related case. A lot of duplicate effort can thus be avoided. Because of this logical order, the plaintiffs suggest that an economy of the Court's time can be effected simply by placing a stay on activity connected with the case at bar pending the outcome of critical issues in Hoai v. Sun Refining, at the discretion of the Court.

WHEREFORE, the plaintiffs pray their motion will be granted for an indefinite stay of all action in the case at bar pending resolution of key elements of the PMPA case with the stay to be lifted at the discretion of the court.

Respectfully submitted,
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